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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 61

E. FRANKLIN BREWSTER, PETITIONER,

vs.

BERT P. GAGE, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 4, 1929

CERTIORARI GRANTED MAY 13, 1929

(34,116)

(34,116)

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

No. 3151

E. Franklin Brewster, Plaintiff,

against

Bert P. Gage, Collector of Internal Revenue, Defendant

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's atorneys or if the complaint is not served with this summons to serve a notice of appearance within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable John R. Hazel, Judge of the District Court of thee United States of America, at the City of Buffalo, in the Western District of New York, and the seal of said Court, this 19th day of July in the year of our Lord one thousand nine hundred and twenty-six.

Harris S. Williams, Clerk. Messrs. Castle and Fitch, Plaintiff's Attorneys. Office and Post Office address: 910 Union Trust Bldg., Rochester, New York. (Seal.)

[fol. 2] In United States District Court

[Title omitted]

Complaint

The plaintiff above named by Castle & Fitch, his attorneys, complaining of the defendant, respectfully shows to this Court:

First. That the plaintiff duly executed and filed with the Collector of Internal Revenue at Buffalo, N. Y. income tax returns for the calendar years 1920, 1921 and 1922 and duly paid the amount of the taxes as shown by said returns.

Second. That thereafter a review and audit of said returns was made by the United States Treasury Department and on or about December 10, 1924, the Commissioner of Internal Revenue, assuming to act under the Statutes of the United States, found due and assessed additional income taxes of

$1,799.68	for year	1920
108.94	" "	1921
and 493.28	" "	1922

aggregating in all $2,401.90 as plaintiff was advised by the Treasury Department's letter dated December 10, 1924, [fol. 3] entitled "IT:PA-2-HLM-203".

Third. That thereafter and on or about the 9th day of February, 1926, the plaintiff under threat of distraint paid to defendant under protest said additional taxes of $2,401.90.

Fourth. That claim for refund of said additional taxes was duly filed by the plaintiff with the defendant on or about January 15, 1926, but said claim has not been allowed or paid although six months have elapsed since the filing thereof as aforesaid. That on or about April 6, 1926, plaintiff received a letter from C. R. Nash, Assistant to the Commissioner of Internal Revenue, advising that plaintiff's claim would be rejected.

Fifth. That said additional taxes were erroneously and illegally assessed for the following reasons:

As appears from the report of W. P. Mays, Internal Revenue Agent in Charge, dated February 11, 1924, the letter of the Treasury Department dated April 3, 1924, entitled "IT:PA:2-FPH-206-APP" and the Department's letter dated December 10, 1924, entitled "IT:PA-2-HLM-203" said additional taxes were assessed because of profits on sales of securities. In estimating these profits the department valued securities which taxpayer had received under the will of his father, the late E. Frank Brewster, at

their appraised value at the time of testator's death rather [fol. 4] than at their value at the time of distribution as should have been done under the decisions of the U. S. Board of Tax Appeals in Appeal of F. W. Matthiessen Jr. Vol. 2 U. S. B. of T. A. Reports p. 921.

Wherefore plaintiff demands judgment for the sum of $2,401.90 with interest thereon from February 9, 1926, together with the costs of this action.

Castle & Fitch, Attorneys for Plaintiff, 910 Union Trust Bldg., Rochester, N. Y.

Duly sworn to by E. Franklin Brewster. Jurat omitted in printing.

[fol. 5] In United States District Court

[Title omitted]

Answer

The defendant above named by Richard H. Templeton, United States Attorney in and for the Western District of New York, answering the complaint herein:

1. Admits the allegations contained in paragraphs of said complaint designated One, Two, Three and Four.

2. Denies the allegations contained in paragraph of said complaint designated Five.

Wherefore the defendant demands judgment against the plaintiff dismissing the complaint herein together with costs and disbursements of this action.

Richard H. Templeton, United States Attorney in and for the Western District of New York. Office and Post Office Address: 404 Federal Bldg., Buffalo, N. Y.

[fol. 6] *Duly sworn to by Richard H. Templeton. Jurat omitted in printing.*

[fol. 7] PLAINTIFF'S EXHIBIT 6

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. That the plaintiff duly executed and filed with the Collector of Internal Revenue for the Twenty-eighth District of New York his individual income tax returns for the calendar years 1920, 1921 and 1922, and duly paid the income taxes disclosed by said returns.

2. That thereafter the Commissioner of Internal Revenue upon additional information and facts submitted to him directed a review and audit to be made of said returns and as [fol. 8] a result of such review and audit determined that additional income taxes were due from the plaintiff in the following amounts: $1,799.68 for the year 1920; $94.94 for the year 1921; and $453.59 for the year 1922, or a total of $2,348.21.

3. That said additional income taxes in the amount of $2,348.21 were duly assessed, and paid by the plaintiff under protest on or about the 9th day of February, 1926, together with interest in the amount of $53.69.

4. That on or about the 15th day of January, 1926, the plaintiff filed with the defendant a claim for refund for the year 1920 in the amount of $1,799.68; for the year 1921 a claim for refund in the amount of $94.94 and interest in the amount of $14.00, or a total of $108.94, and for the year 1922 a claim for refund in the amount of $453.59 and interest in the amount of $39.69, or a total of $492.28. That on or about the 9th day of April, 1926, the Commissioner of Internal Revenue rejected each of said claims for refund in its entirety.

5. That under the will of his father, E. Franklin Brewster, deceased, the plaintiff received certain securities, some of which he sold in the years 1920, 1921 and 1922; that on April 19, 1920, at a Surrogate's Court at Rochester in the State of New York a decree was entered (a copy whereof is hereto annexed and made a part hereof and marked Exhibit "A") whereby the executors under the will of said E. Franklin Brewster were directed to distribute certain [fol. 9] securities to the plaintiff; that certain securities ordered distributed by the Surrogate's Court and subsequently sold by the plaintiff, the values at which they were distributed, the appraised values for Federal estate tax purposes at the death of the said E. Franklin Brewster, the value at the date of actual receipt by the plaintiff, the year of sale, and the amount received therefor are as follows:

Year sold		Securities	Sale price	Appraised value	Value June 28, 1920, when received
1920	22 Shs.	Eastman Kodak....	$11,550.00	$9,350.00	$11,770.00
1920	25 "	Lincoln Bank.....	6,250.00	5,500.00	6,500.00
1920	15 "	American Chicle pfd.	944.40	945.00	945.00
1921	66 "	Childs Co. com.....	6,257.46	4,290.00	5,742.00
1922	22 "	Bankers Trust Co...	8,024.72	5,398.58	7,700.00
1922	60 "	General Cigar Co. com. (United Cigar Stores)....	4,631.10	2,700.00	3,900.00
			$37,657.68	$28,183.58	$36,557.00

6. In computing the profit or loss on the sale of said securities the Commissioner of Internal Revenue used as a basis of cost to the plaintiff the values at the date of death of E. Franklin Brewster, as appraised for Federal estate tax purposes.

Castle & Fitch, Attorneys for Plaintiff. Richard H. Templeton, R. A. G., Attorney for Defendant.

[fol. 10] EXHIBIT "A" TO STIPULATION

At a Surrogate's Court held in and for the County of Monroe, at the Court House, in the City of Rochester, N. Y., on the 19th day of April, 1920.

Present: Hon. Selden S. Brown, Surrogate.

SURROGATE'S COURT, MONROE COUNTY

In the Matter of the Final Judicial Settlement of the Accounts of ROCHESTER TRUST & SAFE DEPOSIT COMPANY, HIRAM R. WOOD, and E. FRANKLIN BREWSTER, JR., as Executors of the Last Will and Testament of E. Frank Brewster, Deceased.

Rochester Trust & Safe Deposit Company, Hiram R. Wood and E. Franklin Brewster, Jr., as executors of the last will and testament of E. Frank Brewster, late of the City of Rochester aforesaid, deceased, having heretofore made application to the Surrogate of the County of Monroe for a final judicial settlement of their accounts as such executors and a citation having been issued pursuant to statute directed to all persons interested in the estate of said deceased citing and requiring them, and each of them, per-
[fol. 11] sonally to be and appear before said Surrogate at his office in said City of Rochester on the 6th day of April, 1920 at 10 o'clock in the forenoon of that day, then and there to attend such final judicial settlement; and the said citation having been returned with proof of due service thereof on the following named persons, to wit: William M. Brewster, Emily Brewster Frelinghuysen, Caroline Brewster Knight, Sallie Brewster Mulligan, Ridgway Knight, George Knight, Wesley Brewster Mulligan, Carolyn Brewster Mulligan, Vincent H. Riordan, Collector of Internal Revenue, Daniel C. Roper, Commissioner of Internal Revenue, Eugene M. Travis, Comptroller of the State of New York, Charles L. Pierce, Corporation Counsel of the City of Rochester, New York Life Insurance Company, Church Pension Fund, Seward Lippincott and George Hayt, legatees, next of kin, heirs at law, creditors and other persons interested in the estate of said E. Frank Brewster, late of the City of Rochester, deceased; and the said executors having appeared on the return day of said citation by Messrs. McGuire & Wood, their attorneys, the said E. Franklin Brewster, Jr., one of said executors as a claimant against said estate for certain shares of stock of the California Packing Corporation, by [illegible]rge S. Van Schaick, Esq., his attorney, and no oth[illegible]rsons or corporations having appeared in any manner, and Burlew Hill, Esq., by an appropriate order of this court, having been duly

appointed and having duly qualified and consented in writing to act as special guardian of said Ridgway Knight, [fol. 12] George Knight, Wesley Brewster Mulligan and Carolyn Brewster Mulligan, who are infants; and the said executors having duly rendered their accounts under oath before the said Surrogate showing their transactions up to and including December 31, 1919, and the said accounts having been filed, together with the vouchers in support thereof, and the matter having been duly adjourned to this day, and the said executors having filed their supplemental account bringing their transactions down in full from December 31, 1919 to and including this day, to wit: April 19, 1920; and the counsel for said E. Franklin Brewster, Jr., as the claimant of the stock of said California Packing Corporation having presented the evidence in support of his said claim showing that he, the said claimant, was and at all times had been the true and actual owner of said stock subject to the payment of an indebtedness to the decedent in the sum of six thousand three hundred fifty dollars ($6,350) with interest thereon from November 8, 1916, upon which had been paid on account thereof prior to the death of the decedent on May 20, 1918 in various payments the sum of four hundred ($400) dollars, and that said stock had been held by the decedent as collateral security for the payment of said indebtedness; and Hiram R. Wood, Esq., one of the executors and a member of the firm of McGuire & Wood, attorneys for the executors, having testified as to the extent and value of the legal services performed for said executors [fol. 13] and estate by said firm of McGuire & Wood and an allowance having been made therefor as hereinafter indicated; and the said special guardian having reported to the court that he had examined the papers, proceedings, accounts and vouchers and that the said infants had been properly served with said citation and had been duly brought under the jurisdiction of the court, that said accounts were regular and sufficient on their face and that proper vouchers had been filed by the executors showing the payments for which they claimed credit; and said Surrogate having considered the evidence and the report of said special guardian and having examined the said vouchers and accounts, now here finds the state and condition of the said accounts to be as stated and set forth in the following summary statements thereof, made by the said Surrogate

as finally settled and adjusted by him, to be recorded with, and taken to be a part of the decree in this matter, to wit:

Summary Statement of Account Dated March 5, 1920, Covering Period to December 31, 1919

The executors are chargeable as follows:

Receipts of principal as per Schedule A, column 1	1,239,030.03	
Net profits on sales and distributions as per Schedule B	50,993.84	
[fol. 14] Receipts of income as per Schedule A, column 2	77,955.92	

And are to be credited as follows:

Debts paid as per Schedule B, column 1		336,887.15
Transfer taxes as per Schedule B, column 3		78,303.03
Administration expenses as per Schedule B, column 4		758.38
Property on hand as per Schedule C		291,213.31
Distributions as per Schedule D		567,832.80
Current interest and expenses as per Schedule B, column 2		21,794.40
Cash on hand		71,190.72
	$1,367,979.79	$1,367,979.79

Summary Statement of Account Dated April 19, 1920, Covering Period From January 1, 1920, to April 19, 1920

The executors are chargeable as follows:

Property on hand January 1, 1920	291,213.31
[fol. 15] Cash on hand January 1, 1920	71,190.72
	362,404.03

Receipts of principal January 1 to April 19, 1920 as per Schedule A	309.77	
Net increase in value of securities over inventory values as per Schedule C	53,262.94	
Receipts of income January 1 to April 19, 1920 as per Schedule A	10,776.25	
And are to be credited as follows:		
Debts paid from principal January 1 to April 19, 1920 as per Schedule B		15,174.77
Current interest, income taxes, etc., as per Schedule B		6,354.42
Securities on hand as per Schedule C		350,411.25
Cash balance		54,812.55
	$426,752.99	$426,752.99

And it appearing that the said executors have fully accounted for all the moneys and property of the estate of said deceased which have come into their hands as such [fol. 16] executors, and their account and supplemental account showing their transactions down to and including April 19, 1920 having been finally adjusted by said Surrogate and summary statements of the same having been made as above and herewith recorded, it is hereby

Ordered, adjudged and decreed that the said accounts be, and the same are hereby, finally and judicially settled and allowed as filed and adjusted; and it is further

Ordered, adjudged and decreed that the claims of alleged creditors heretofore made by New York Life Insurance Company, Seward Lippincott and George Hayt be, and the same are hereby, dismissed; and it is further

Ordered, adjudged and decreed that said two hundred (200) shares of stock of the California Packing Corporation found in the possession of the testator by said execu-

tors and inventoried by them as a part of his estate are and at all times were the individual absolute property of said E. Franklin Brewster, Jr., subject to the payment by him of an indebtedness to said decedent in the sum of six thousand three hundred fifty ($6,350) dollars with interest thereon from November 8, 1916, less payments made by him to apply thereon prior to the date of said decedent's death on May 20, 1918, aggregating four hundred ($400) dollars, the principal and interest of said indebtedness to the date [fol. 17] of the death of said decedent being six thousand five hundred thirty-four dollars and twenty cents ($6,534.20). That said stock was held by the decedent as collateral security for said indebtedness, that said claimant is entitled to the possession of the certificates therefor upon payment to the said executors of said indebtedness with interest to the time of payment, and said executors are hereby directed upon receipt of said indebtedness with interest to deliver over the certificates representing said shares of stock; and the said executors are hereby credited with the difference between the inventory value of said stock with which they have heretofore been charged, and the amount of the said indebtedness for which the same was held as collateral. And it is further

Ordered, adjudged and decreed that out of the balance of the moneys and property remaining in the hands of the said executors allowances be made and paid by the said executors as follows:

Burlew Hill, Esq., fees and allowance as special guardian one thousand ($1000) dollars.

McGuire & Wood, fees and allowance as attorneys for the executors from and including the probate of the will to and including the filing of the final account of the executors and the entry of the order discharging them of their trust, the sum of twenty-five thousand ($25,000) dollars together with disbursements to this day amounting to four [fol. 18] hundred seventy-three dollars and eighty-three cents ($473.83).

E. Franklin Brewster, Jr., or George S. Van Schaick, Esq., upon contest as to ownership of said stock, costs one hundred seventy ($170) dollars and disbursements fifty ($50) dollars, making a total of two hundred twenty ($220) dollars.

Rochester Trust & Safe Deposit Company fees as executor, the sum of thirteen thousand nine hundred eighty-three dollars and seventy-four cents ($13,983.74), which sum does not include fees (which will hereafter be allowed) for receiving and paying out the undistributed securities hereinafter set forth, amounting in all to the sum of fifty-one thousand four hundred eighty-eight dollars and seventy-five cents ($51,488.75).

Hiram R. Wood, Esq., fees as executor, the sum of thirteen thousand nine hundred eighty-three dollars and seventy-four cents ($13,983.74), which sum does not include fees (which will hereafter be allowed) for receiving and paying out the undistributed securities hereinafter set forth, amounting in all to the sum of fifty-one thousand four hundred eighty-eight dollars and seventy-five cents ($51,488.75).

E. Franklin Brewster, Jr., fees as executor the sum of thirteen thousand nine hundred eighty-three dollars and seventy-four cents ($13,983.74), which sum does not include [fol. 19] fees (which will hereafter be allowed) for receiving and paying out the undistributed securities hereinafter set forth, amounting in all to the sum of fifty-one thousand four hundred eighty-eight dollars and seventy-five cents ($51,488.75). And it is further

Ordered, adjudged and decreed that the said executors be, and they are hereby, directed to distribute the following property shown to be in their hands by their said supplemental account of March 19, 1920, in equal shares as follows: One-fifth (1/5) part thereof to E. Franklin Brewster, Jr., one-fifth (1/5) part thereof to William M. Brewster, one-fifth (1/5) part thereof to Emily Brewster Frelinghuysen, one-fifth (1/5) part thereof to Rochester Trust & Safe Deposit Company as trustee for Caroline Brewster Knight, et al., and one-fifth (1/5) part thereof to the Rochester Trust & Safe Deposit Company as trustee for the benefit of Sallie Brewster Mulligan et al., to wit:

To E. Franklin Brewster, Jr.

Shares	Stocks	Value
15	American Chicle pfd.	1,080
2	American Cons. Pine Fiber Co. com.	0
2	American Cons. Pine Fiber Co. pfd.	0

Shares	Stocks	Value
40	American Tobacco Securities Corp. com.	2,510
	American Tobacco Co. script par $250	512.50
[fol. 20] 512	Bagdad Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co.	8,514
20	British-American Tobacco Co.	435
66	Childs Co. com.	5,940
22	Eastman Kodak Co. com.	12,100
20	Havana Tobacco Co. pfd.	40
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com.	730
10	Rochester, Lockport & Buffalo Ry. Corp. pfd.)	500
15	Rochester, Lockport & Buffalo Ry. Corp. com.)	....
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Co.	2,100
20	Submarine Boat Corp.	290
60	United Cigar Mfg. Co. com.	4,140
	Bonds	
Par $3,000,	Third Liberty Loan	2,601
		$58,184.50

To William M. Brewster

Shares	Stocks	Value
15	American Chicle pfd.	1,080
2	American Cons. Pine Fiber Co. com.	0
2	American Cons. Pine Fiber Co. pfd.	0
40	American Tobacco Securities Corp. com.	2,510
[fol. 21]	American Tobacco Co. script, par $250	512.50
512	Bagdad Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co.	8,514
20	British-American Tobacco Co.	435
66	Childs Co. com.	5,940
22	Eastman Kodak Co. com.	12,100
20	Havana Tobacco Co. pfd.	40

Shares	Stocks	Value
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com.	730
10	Rochester, Lockport & Buffalo Railway pfd.)	....
15	Rochester, Lockport & Buffalo Railway com.)	...
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Company	2,100
20	Submarine Boat Corp.	290
60	United Cigar Mfg. Co. com.	4,140

Bonds

Par $3,000,	Third Liberty Loan	2,601
		$58,184.50

To Emily Brewster Frelinghuysen

Shares	Stocks	Value
15	American Chicle pfd.	1,080
2	American Cons. Pine Fiber Co. com.	0
2	American Cons. Pine Fiber Co. pfd.	0
[fol. 22] 40	American Tobacco Securities Corp.	2,510
	American Tobacco Co. script par $250	512.50
512	Bagdad Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co	8,514
20	British-American Tobacco Co	435
66	Childs Co. com.	5,940
22	Eastman Kodak Co. com	12,100
20	Havana Tobacco Co. pfd	40
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com	730
10	Rochester, Lockport & Buffalo Ry. Corp. pfd.)	500
15	Rochester, Lockport & Buffalo Ry. Corp. com.)	....
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Company	2,100
20	Submarine Boat Corp	290
60	United Cigar Mfg. Co. com	4,140

Bonds

Par $3,000, Third Liberty Loan		2,601
		$58,184.50

To Rochester Trust & Safe Deposit Company as Trustee for Caroline Brewster Knight et al.

Shares	Stocks	Value
15	American Chicle pfd	1,080
[fol. 23] 2	American Cons. Pine Fiber So. com	0
2	American Cons. Pine Fiber Co. pfd	0
40	American Tobacco Securities Corp. com	2,510
	American Tobacco Co. script par $250	512.50
512	Bagdad-Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co	8,514
20	British-American Tobacco Co	435
66	Childs Co. com	5,940
22	Eastman Kodak Co. com	12,100
20	Havana Tobacco Co. pfd	40
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com	730
10	Rochester, Lockport & Buffalo Ry. Corp. pfd.)	500
15	Rochester, Lockport & Buffalo Ry. Corp. com.)	....
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Co	2,100
20	Submarine Boat Corp	290
60	United Cigar Mfg. Co. com	4,140

Bonds

Par $3,000, Third Liberty Bonds	2,601
	$58,184.50

[fol. 24] To Rochester Trust & Safe Deposit Company as Trustee for Sallie Brewster Mulligan et al.

Shares	Stocks	Value
15	American Chicle pfd	1,080
2	American Cons. Pine Fiber Co. com	0
2	American Cons. Pine Fiber Co. pfd	0
40	American Tobacco Securities Corp. com	2,510
	American Tobacco Co. script par $250	512.50
512	Bagdad Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co	8,514
20	British-American Tobacco Co	435
66	Childs Co. com	5,940
22	Eastman Kodak Co. com	12,100
20	Havana Tobacco Co. pfd	40
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com	730
10	Rochester, Lockport & Buffalo Ry. Corp. pfd.	500
15	Rochester, Lockport & Buffalo Ry. Corp. com	....
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Co	2,100
20	Submarine Boat Corp	290
60	United Cigar Mfg. Co. com	4,140

Bonds

[fol. 25]	Par $3,000, Third Liberty Loan	2,601
		$58,184.50

And it is further

Ordered, adjudged and decreed that the balance of the moneys and property in the hands of said executors amounting to forty-four thousand one hundred ninety dollars and forty-five cents ($44,190.45) be retained by them for the purpose of the payment of adjustments of estate, transfer, income and other taxes, if any there may be, and other proper payments of disbursements on account of said estate until the further order of this court, the said property being as follows, to wit:

Shares	Stocks	Value
80	American Tel. & Tel.	7,690
½	Childs Co. com.	45
55	Great Northern Railway pfd.	4,180
50	Northern Pacific Railway	3,850
1	Rochester & Genesee Valley RR.	80
50	Southern Pacific com.	4,856.25
50	Union Pacific com.	5,925
128	Western Union Telegraph Co.	11,200
2	Tom Wilson Knife	0
Par	**Bonds**	
500	Bridgewater Land Ass'n 4's 1927	400
300	Century Club 5's 1933	270
2000	Havana Tobacco 5's 1922	1,000
[fol. 26] 2500	Ontario Power Co. 5's 1943	2,062.50
7750	Rochester Railway & Light Co. 5's 1954	6,355
5500	Rochester Telephone 5's 1933	3,575
		51,488.75

of which the executors may dispose of so much as may be necessary in order to obtain funds with which to make the disbursements and payments above ordered leaving a balance of forty-four thousand one hundred ninety dollars and forty-five cents ($44,190.45) as above stated, for which they shall remain accountable. And it is further

Ordered, adjudged and decreed that this accounting be adjourned until the 12th day of July, 1920 at 10:30 o'clock A. M., the court hereby retaining jurisdiction of the proceeding and of the parties heretofore cited for the purpose of making such further order and decree with reference to the matter as to it may seem just and proper.

Selden S. Brown, Surrogate.

[fol. 27] In United States District Court

[Title omitted]

Castle & Fitch, Rochester, New York, for Plaintiff.

Richard H. Templeton, United States Attorney, Buffalo, N. Y., C. M. Charest, General Counsel, Bureau of Internal

Revenue, J. D. Smith, Special Attorney, Bureau of Internal Revenue, Washington, D. C., for Defendant.

OPINION

HAZEL, District Judge:

This is an action at law to recover illegally assessed taxes amounting to $2,401.90 with interest from February, 1926. The agreed facts show that plaintiff was one of five residuary legatees of his father who died on May 20th, 1918. After probate of the will, the Surrogate, on April 19th, 1920, ordered distribution to the legatees of certain securities held by the estate, but new certificates of stocks were not delivered until June 29th, 1920, because of delay in transferring the same on the books of the companies. In 1920-21-22, plaintiff sold certain securities distributed to [fol. 28] him, as appears by the stipulation in evidence. The single question submitted for decision is whether, in determining the profits on the sales for the purpose of taxation, the basis of cost of the securities sold is their appraised value for taxation at the time of his father's death, or at the date of the order of distribution, or when the last certificate of transfer was secured. The income tax was assessed by the Commissioner of Internal Revenue on the basis of the value as appraised as of the death of the testator and the profits realized on sales, while in opposition, plaintiff contends that their value should be established as to the date of the Surrogate's decree of distribution, or the time when he actually acquired them.

I have examined the adjudications to which my attention is drawn by counsel for defendant, but I nevertheless incline to the view that the securities in question were not acquired by plaintiff, within the meaning of sec. 213 of the Revenue Act of 1918, until distributed to plaintiff under the Surrogate's decree, and, moreover, that any increased value between the time of the death of his father and the date of distribution should not be included in this income return. While ordinarily the legatee may be said to have acquired property devised to him by will in the sense that he had a vested property right therein, yet such right, being equitable, is not really vested until it is set off or distributed to

him. It was so held in the appeal of F. W. Mathiesson, Jr., 2 B. T. A. 921; and also that the tax accrued on the date [fol. 29] when the legatees divided the assets by which they assigned to each other certain stocks as their respective shares in the estate. But the Court of Claims affirmed the decision of the Board of Tax Appeals, overruling the contention of Mathiesson that the stock was not acquired until the certificates were transferred on the corporation's books, and decreed that omission in this relation did not affect the title. In Alice Fisher Foster vs. Comm'r., Vol. 7 B. T. A. 1137, the Board of Tax Appeals again had substantially the same question before it, and the Board adhered to its ruling in the Matthiesson case.

These decisions are persuasive of their correctness, and, as they involved substantially the same question as here presented, I think it must be held that the basis of the tax is the value of the stock at the time of distribution and not at the time of the testator's death, or when the certificates were delivered to the plaintiff. It makes no difference that the equitable right could have been sold or transferred by plaintiff, since for ascertainment of the basis of the tax there must have been an acquirement by gift, bequest, device, or descent of the securities in question, and by that is implied an absolute ownership and control over them. Therefore, the gain or deducible loss on the securities sold by plaintiff should be based on the difference between their worth on April 19, 1920, and the amount received for them. For these reasons I have signed the findings of law presented by plaintiff, without deeming it necesssary to spe- [fol. 30] cifically dwell upon the various adjudications cited in defendant's brief.

Dated December 27th, 1927.

John R. Hazel, U. S. D. J.

In United States District Court

E. Franklin Brewster, Plaintiff,

against

Bert P. Gage, Collector of Internal Revenue, Defendant

Judgment

The issues in this action having been duly brought to trial before Hon. John R. Hazel, United States District

Judge, at a Term of this Court held at Buffalo, N. Y., on the 18th day of November, 1927, and the court having heard the allegations and proofs of the parties, and after due deliberation having made its decision in writing in favor of the plaintiff against the defendant with Findings of Fact and Conclusions of Law duly filed in the Clerk's office of said Court,

Now, on said decision and on motion of Castle & Fitch, attorneys for the plaintiff, it is

[fol. 31] Ordered, adjudged and decreed that the plaintiff, E. Franklin Brewster, recover of the defendant, Bert P. Gage, Collector of Internal Revenue, the sum of $2,401.90 with interest from February 9, 1926, amounting to $276.22 besides the costs of this action taxed at $33.00, amounting in all to $2,711.12 and have execution therefor. Judgment signed and entered this 16th day of January, 1928.

Harris S. Williams, Clerk.

In United States District Court

[Title omitted]

Plaintiff's Costs and Disbursements

Costs by Statute	$20.00
Clerk's fee on filing complaint & judgment	10.00
Serving summons and complaint	3.00
Cost and disbursements	$33.00

[fol. 32] Costs taxed at $33.00 this 16th day of January, 1928.

Harris S. Williams, Clerk.

Duly sworn to by J. Sawyer Fitch. Jurat omitted in printing.

[fol. 33] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice, that in compliance with the Act of Congress, approved January 31, 1928, this office will ap-

peal from the judgment entered in the above entitled proceedings.

Dated Buffalo, N. Y., February 16, 1928.

Yours, etc., Richard H. Templeton, United States Attorney in and for the Western District of New York. Office & Post Office address: 405 Federal Building, Buffalo, New York.

To Messrs. Castle & Fitch, Attorneys for Plaintiff.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the defendant Bert P. Gage, Collector of Internal Revenue for the Twenty-eighth District of New York (plaintiff in error) and makes and files this, his assignment of errors—upon which he will rely in the prosecution of his appeal in the above entitled cause from the judgment rendered herein by this Court on January 16, 1928.

First. In that the Court erred in holding that under the provisions of Sec. 213 (b) of the Revenue Act of 1918 the stocks in question were "acquired" by the plaintiff at the date of the Surrogate's decree of April 19, 1920.

Second. In that the Court erred in holding that the taxable gain or deductible loss on the sale of the stocks in question should be based on the difference between their worth on April 19, 1920, and the amount received therefor.

Third. In that the Court erred in not holding that the [fol. 35] stocks in question were "acquired" by the plaintiff at the date of the death of his father under the provisions of Sec. 213 (b) of the Revenue Act of 1918.

Fourth. In that the Court erred in not holding that the taxable gain or deductible loss on the sale of the stocks in question should be based on the difference between the value of the stocks at the date of the death of the plaintiff's father and the amount received therefor.

Fifth. In that the Court erred in rendering judgment in favor of the plaintiff and against the defendant.

Richard H. Templeton, United States Attorney,
Attorney for Defendant.

[fol. 36] In United States District Court

[Title omitted]

Plaintiff's Requests for Findings of Fact and Conclusions of Law

Now comes the plaintiff by his attorneys, Castle & Fitch, and requests the court specifically to find the facts as stipulated by the parties.

The plaintiff requests the court to find as matters of law:

1. That the stocks in question were "acquired" by the plaintiff on April 19, 1920, the date of the Surrogate's decree of distribution.

Found. John R. Hazel, D. J.

2. That under the provisions of Section 202 (a) (2) of the Revenue Act of 1918 and Section 202 (a) (3) of the Revenue Act of 1921 the taxable gain or deductible loss on the stocks in question should be based on the difference between their value on April 19, 1920 and the proceeds received therefor.

Found. John R. Hazel, D. J.

Castle & Fitch, Attorneys for Plaintiff.

[fol. 37] In United States District Court

[Title omitted]

Defendant's Requests for Findings of Fact and Conclusions of Law

Now comes the defendant by his attorney, Richard H. Templeton, United States Attorney, and requests the court specifically to find the facts as stipulated by the parties.

The defendant requests the court to find as matters of law:

1. That the stocks in question were "acquired" by the plaintiff at the date of the death of his father under Section 213 (b) (3) of the Revenue Act of 1918.

2. That under the provisions of Section 202 (a) (2) of the Revenue Act of 1918 and Section 202 (a) (3) of the Revenue Act of 1921 the taxable gain or deductible loss on the stocks in question should be based on the difference between their value at the date of the death of the plaintiff's father and the proceeds received therefor.

Richard H. Templeton, United States Attorney, Attorney for Defendant.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO VALUES OF SECURITIES

It is hereby stipulated by and between the attorneys in the above entitled action, that the values of the securities in question, as set forth in the decree of the Surrogate's Court of Monroe County, dated April 19th, 1920, were the actual market values as of that date.

Dated November 18th, 1927.

Castle & Fitch, Attorneys for Plaintiff. Richard H. Templeton, R. A. G., Attorney for Defendant.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated by and between the attorneys for the respective parties hereto that the trial of the above action before a jury be and the same hereby is waived.

Castle & Fitch, Attorneys for Plaintiff. Richard H. Templeton, Attorney for Defendant.

[fol. 40] IN UNITED STATES DISTRICT COUET

STIPULATION AS TO RECORD

It is hereby stipulated by and between the attorneys for the parties herein that the foregoing record contains all the papers necessary for the determination of the appeal.

Castle & Fitch, Attorneys for Plaintiff-Appellant.
Richard H. Templeton, U. S. Attorney, by Richard A. Grimm, Asst. U. S. Attorney, Attorney for Defendant-Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 41] IN UNITED STATES DISTRICT COURT

SCHEDULE D

Distributions

Emily B. Frelinghuysen, Daughter:

1919			
Jan. 1.	1,000 shares pfd. stock Brewster Gordon & Company, Inc.	$100,000.00	
July 1.	50 shares Swift & Co.	6,735.50	
" "	2% dividend on same	100.00	
	50 Swift rights	330.00	
	65 Swift Internacional	3,824.85	
	Dividend on same	78.00	
	55 shares Libby, McNeill & Libby	1,641.11	
	⅓ Household furniture @ inventory value	1,383.50	
			$114,092.96

Caroline B. Knight, Daughter:

	⅓ Household furniture @ inventory value..	1,383.50

Rochester Trust & Safe Deposit Co. as trustee for Caroline B. Knight, Daughter:

[fol. 42]

1919.			
Jan. 1.	1,000 shares pfd. stock Brewster Gordon & Company, Inc.	100,000.00	
July 1.	50 shares Swift & Co.	6,735.50	
	2% dividend on same	100.00	
	50 Swift rights	330.00	
	65 Swift Internacional	3,824.85	
	Dividend on same	78.00	
	55 shares Libby, McNeill & Libby	1,641.11	
			112,709.46

William M. Brewster, Son:

1919.			
Jan. 1.	1,000 shares pfd. stock Brewster Gordon & Company, Inc.	100,000.00	
July 1.	50 shares Swift & Co.	6,735.50	
	2% dividend on same	100.00	
	50 Swift rights	330.00	
	65 Swift Internacional	3,824.85	
	Dividend on same	78.00	
	55 shares Libby, McNeill & Libby	1,641.11	
			$112,709.46

Sallie B. Mulligan, Daughter:

	⅓ Household furniture @ inventory value	1,383.50	

[fol. 43] Rochester Trust & Safe Deposit Co. as trustee for Sallie B. Mulligan, Daughter:

1919.			
Jan. 1.	1,000 shares pfd. stock Brewster Gordon & Company, Inc.	100,000.00	
July 1.	50 shares Swift & Co.	6,735.50	
" "	2% dividend on same	100.00	
	50 Swift rights	330.00	
	65 Swift Internacional	3,824.85	
	Dividend on same	78.00	
	55 shares Libby, McNeill & Libby	1,641.11	
			$112,709.46

E. Franklin Brewster, Jr., Son:

1919.			
Jan. 1.	1,000 shares com. stock Brewster Gordon & Company, Inc.	$100,000.00	
	Cash	12,709.46	
	Plated coffee urn inventoried @	5.00	
	3 pair candle sticks inventoried @	15.00	
	1 gold watch and chain inventoried @	50.00	
	1 pair cuff links inventoried @	15.00	
[fol. 44]	1 stick pin	50.00	
			$112,844.46
	Total		$567,832.80

NOTE.—The Sallie B. Mulligan trust share having been actually sold by the Rochester Trust & Safe Deposit Company as her trustee, the other shares are charged with the net proceeds of her share as determined by such actual sale as follows:

50 Swift at 135 less commissions and taxes $14.90	6,735.50
2% dividend on same July 1, 1919	100.00
50 Swift rights at 6¾ less commissions and taxes $7.50	330.00
65 Internacional at 59 less commissions and taxes $10.15	3,824.85
$1.20 per share dividends on same June 20, 1919	78.00
55 Libby at 30 less commissions and taxes $8.49	1,641.11
Total	$12,709.46

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1928

No. 176

Argued January 17, 1929. Decided February 4, 1929

E. FRANKLIN BREWSTER, Defendant-in-Error,

v.

BERT P. GAGE, Collector of Internal Revenue, Plaintiff-in-Error

In Error to the District Court of the United States for the Western District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Writ of error to the District Court for the Western District of New York. Action by E. Franklin Brewster, plaintiff, against Bert P. Gage, Collector of Internal Revenue, defendant, to recover income taxes alleged to have been illegally collected as additional taxes. Judgment for plaintiff; defendant appeals. Reversed.

Richard H. Templeton, U. S. Atty., of Buffalo, N. Y., C. M. Charest, Gen. Counsel, Bureau of Internal Revenue, and W. H. Trigg, Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., for plaintiff in error.

Castle & Fitch, of Rochester, N. Y. (J. Sawyer Fitch, of Rochester, N. Y., of counsel), for defendant in error.

MANTON, Circuit Judge:

This action was brought to recover income taxes alleged to have been erroneously and illegally collected as additional taxes for the years 1920, 1921 and 1922. Defendant in error filed his return for these years, and reported profits to him realized on the sale of securities which he received as a residuary legatee under his father's will. His income or profit differs in amount according to the date of the death of his father, May 20, 1918, or the date of distribution,

April 19, 1920. The court below held the profit was determinable by subtracting from the sale price the value of the stock so sold at the date of distribution.

Section 213 of the Revenue Act of 1918, 40 Stat. 1065, in referring to the term "gross income," provides that it does not include "the value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income)." And section 202 (a) of the Revenue Act of 1918 (40 Stat. 1060) provides that, for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, the basis shall be, in the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date, and, in the case of property acquired on or after that date, the cost thereof. Section 202 (a) of the Revenue Act of 1921 (42 Stat. 229) provides that, in ascertaining profit or loss on the sale or other disposition of property acquired after February 28, 1913, "in the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition."

The question presented to us is whether the defendant in error "acquired," as such residuary legatee, the securities which he sold at the date of his father's death or the date of the order of distribution. Upon death, the executor or administrator of an estate obtains legal title, and maintains it during a suitable period of administration; but he holds the property so obtained as a trustee for the proper administration for all the parties interested therein. The legal title of all personal property of a decedent, including chattels and choses in action, vests in the personal representative as of the date of death of the decedent. Schouler on Wills, § 2061. But a legatee under a will, subject to the use of the property for the purpose of administration, acquires that to which he is entitled at the instant of the testator's death. Matter of Lansing, 182 N. Y. 238, 74 N. E. 882; Vail v. Vail, 49 Conn. 52; Cook v. McDowell, 52 N. J. Eq. 351, 30 A. 24; Hardy v. Boaz, 29 Ala. 168. When the testator makes his will, he makes his gift. The rights of the legatee are thus fixed. Of course, his property is subject to his debts, and the residuary legatee's rights to the property he may obtain must stand proportionately the burden of that

obligation. Blood v. Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490.

But the legatee obtains a right which he may convey or devise by will. His is an equitable title. The executor (or administrator, if it be a case of intestacy) must account as the will (or law) directs and perform his trust accordingly. When the decree of distribution is made, it relates back to this original right, and disribution gives to the distributee no new title to the property, but only asserts the property to which title shall attach. Wager v. Wager, 89 N. Y. 161; Foster v. Fifield, 20 Pick. (Mass.) 67; Thompson v. Thomas, 30 Miss. 152. Equitable assets are governed by the same rules as legal assets. Perry on Trusts (6th Ed.) § 357. The owner may sell and dispose of them or make conveyance thereof by will. West v. Burke, 219 N. Y. 7, 113 N. E. 561; Sanders v. Soutter, 136 N. Y. 97, 32 N. E. 638. The legal title which is outstanding in the executor during the period of administration has no value in and of itself, and, had it been sought to have been made the subject of a sale, carrying no right to equitable title, it would have commanded no price nor interfered with the carrying out of the trust of the administrator. To ignore the gain upon so much of the sold title as was equitable would be a subordination of that which is real and substantial to that which is neither. It could not have been the intent of Congress to take the legal title apart or separate from that which would pass as earnings to one who is entitled to the equitable title or beneficial interest in the property.

It surely was not the intent of Congress that the acquisition of a mere legal title should completely wipe out or render untaxable the gain which had been acquired by the equitable ownership, and which was, in fact, realized upon the sale made when the date of distribution arrived. Moreover, it would be an unfortunate construction, which is not demanded by the statute, that would place it within the power of personal representatives and the real owners, namely, the legatees or distributees, to defer distribution in order to escape tax. This should be avoided. Frequently the personal representatives and the beneficiaries are the same persons or members of the same family, and the temptation would be opened, where there is a period of rapidly increasing values, to defer distribution until, in the judg-

ment of all concerned, the peak in the market had been reached, so that thereafter sales of the distributed property would register little or no profit and perhaps losses. It would not do to permit heirs and devisees to bring about a postponement of the acquisition of property for such purposes. Heirs and devisees to realty have legal title vested in them at the date of decedent's death. It is just and reasonable to place both classes of property upon the same basis, without a distinction resting solely upon whether the property be realty or personalty.

The Treasury Department, in considering the Revenue Acts since 1913 and the exemption from income tax of property acquired by gift, bequest, devise or descent (section 4 Act of 1916, 39 Stat. 758; section 1200, Act of 1917, 40 Stat. 329; section 213 (b), subd. 3, Act of 1918, 40 Stat. 1065; Act of 1921, 42 Stat. 238; Act of 1924, 43 Stat. 268, and Act of 1926, 44 Stat. 24 [26 U. S. C. A. § 954]), he consistently held that the basic date for the computation of gain or loss on the sale of property so acquired is that of the decedent's death (paragraph 44, Regulation 33, 1918; article 1562 of Regulation 45, 1919; article 1562 of Regulation 45, 1920; article 1563 of Regulation 62, 1922; article 1594 of Regulation 65, 1924; and article 1594 of Regulation 67, 1926). Great weight will be given to contemporaneous construction of an act of Congress by department officials, who are called upon to act under and carry out its provisions, particularly if there be uncertainty or ambiguity. Swendig v. Washington Co., 265 U. S. 322, 44 S. Ct. 496, 68 L. Ed. 1036; Nat. Lead Co. v. United States, 252 U. S. 140, 40 S. Ct. 237, 64 L. Ed. 496; United States v. Hermanos, 209 U. S. 337, 28 S. Ct. 532, 52 L. Ed. 821; United States v. Finnell, 185 U. S. 236, 22 S. Ct. 633, 46 L. Ed. 890.

Three decisions were referred to in the court below and are urged upon us here. Matter of F. W. Matthiessen, Jr., 2 B. T. A. 921; Alice Fisher Foster v. Commissioner, 7 B. T. A. 1137; Matthiessen v. United States, in the Court of Claims, reported in the Commerce Clearing House Federal Tax Service for 1927, vol. 111, p. 7535. In the Matter of Matthiessen, Jr., supra, the taxpayer was a residuary legatee under the will of his father, who died February 11, 1918, in Illinois, and on March 13, 1918, the executors, trustees, and beneficiaries agreed upon a distribution of the

estate, subject to a provision for refunding pro rata to the executor sufficient funds wherewith to meet liabilities of the estate. Shares of corporate stock which remained in the father's name on November 12, 1918, were made out in the name of Matthiessen, the son. On November 19, 1918, he sold the stock. The board held that he acquired it at the date of the agreed distribution, and not at the date of his his father's death. The board said that it was true the taxpayer did acquire a right on the death of the testator, but that right was not a property right in the stock which was the subject-matter of the transaction involved in the appeal. The most that the taxpayer, as residuary legatee, could do, was to demand at the time of the death of the testator a proper administration of the estate and a distribution of the assets as they remained after all debts and claims were settled. But, under the law, the right to a distributive share of personalty in an estate of an intestate vests instanter in the heir upon the death of the owner and not from the time of distribution. Distribution gives the distributee no new title, but only ascertains the property to which the title attaches. Christie v. Railroad Co., 104 Iowa, 707, 74 N. W. 697.

In United States v. Jones, 236 U. S. 106, 35 S. Ct. 261, 59 L. Ed. 488, Ann. Cas. 1916A, 316, relied upon by the board, involved a succession tax. No account was taken of the vesting in interest, but only the question of the vesting in possession and enjoyment, and it is not in point. The court did say that personal property did not pass "directly from the decedent to the legatees or distributees, but goes primarily to the executor or administrator." This, if course, means that possession and enjoyment by the legatee was postponed. It was there held that, until the distribution, the distributee certainly was not entitled to receive or enjoy any part of the property. Foster v. Commissioner, 7 B. T. A. 1137, followed the Matthiessen Case. Later, Matthiessen, after paying the tax, brought the action in the Court of Claims to recover the taxes found by the board, and also a larger sum; the claim being that his acquisition did not occur until his certificates of stock were handed to him and transferred on the books of the issuing corporation. The Court of Claims followed the board's decision, relying upon United States v. Jones, 236 U. S. 112, 35 S. Ct.

261, 59 L. Ed. 488, Ann. Cas. 1916A, 316. But, for the reasons which we have advanced, we cannot agree with the decisions in the Matthiessen Case, either by the Board of Tax Appeals or in the Court of Claims. These reasons are more persuasive to us, and, with the departmental construction justified by the rules of law, lead us to direct that the judgment below be reversed.

Judgment reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 11th day of February, one thousand nine hundred and twenty-nine.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

E. FRANKLIN BREWSTER, Plaintiff-Appellee,

v.

BERT P. GAGE, as Collector, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed, with costs. Further ordered that execution be issued for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. S., T. W. S.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. E. Franklin Brewster v. Bert P. Gage, as

Coll'r. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 11, 1929. William Parkin, Clerk.

United States of America, Southern District of New York

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 46, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of E. Franklin Brewster, Plaintiff-Appellee, against Bert P. Gage, as Collector, etc., Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of March, in the year of our Lord one thousand nine hundred and twenty nine, and of the Independence of the said United States the one hundred and fifty third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 13, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,116. U. S. Circuit Court of Appeals, Second Circuit. Term No. 61. E. Franklin Brewster, petitioner, vs. Bert P. Gage, Collector of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed April 4th, 1929. File No. 34,116.

(9030)

FILE COPY

FILED
APR 4 1929
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. ~~807~~ 61

E. FRANKLIN BREWSTER, PETITIONER,

v.

BERT P. GAGE, COLLECTOR OF INTERNAL REVENUE.

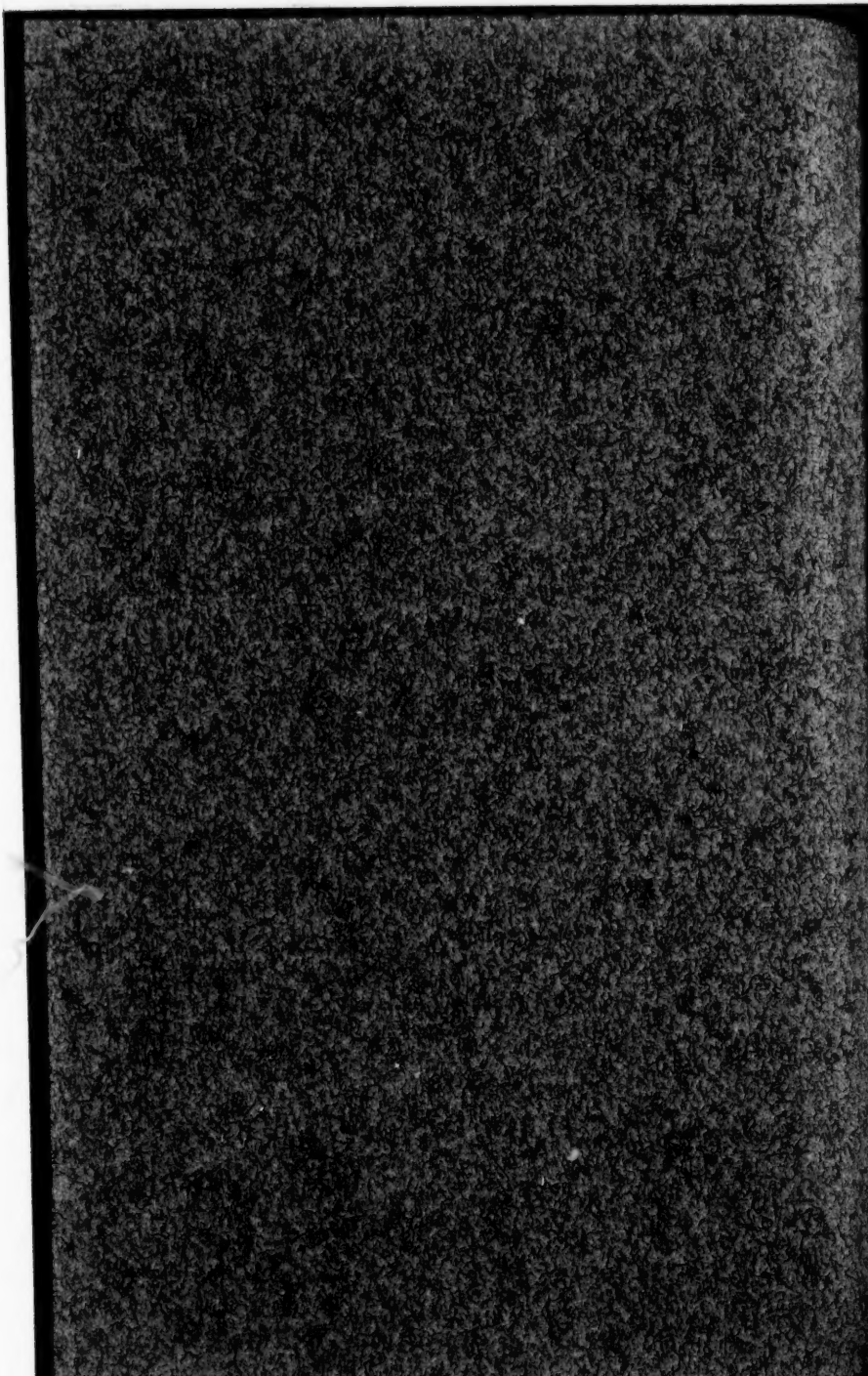
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GURDON W. FITCH,
CASTLE & FITCH,

Counsel for Petitioner,
910 *Union Trust Bldg.,*
Rochester, N. Y.

J. SAWYER FITCH,
Of Counsel.

(34,116)



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 807

E. FRANKLIN BREWSTER, PLAINTIFF-PETITIONER,

v.

BERT P. GAGE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT-RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of E. Franklin Brewster respectfully shows as follows:

First. This is a petition for a writ of certiorari to review a final determination of the Circuit Court of Appeals for the Second Circuit made and entered in

said court on the 11th day of February, 1929, reversing a judgment of the United States District Court for the Western District of New York entered January 16, 1928, in favor of the plaintiff for $2711.12.

Second. This action was brought to recover additional income taxes for the calendar years 1920, 1921 and 1922, which plaintiff claimed had been erroneously and illegally assessed and collected for the following reason: These additional income taxes were caused by the action of the Commissioner of Internal Revenue in determining as taxable profits the difference between the value of certain securities as of the date of the death of plaintiff's father and the price realized by the plaintiff on the sale of such securities after they were distributed to him as one of the residuary legatees of his father's will. Thus, the sole question involved in the case was whether, in determining the gain on the sales of securities by one of five residuary legatees the cost of such securities should be taken at their value as of the date of the decedent's death or at their value on the date of the Surrogate's order for their distribution. This question involves a construction of Section 202 (*a*) of the Revenue Act of 1921, which provides:

> "(3) In case of such property, acquired by bequest, devise or inheritance, the basis shall be the fair price or value of such property at the time of such *acquisition.*"

The District Court held that the cost of the securities should be taken at the value on the date of the Surro-

gate's order of distribution, in accordance with the decisions of the appeal of *F. W. Matthiessen, Jr.*, 2 B. T. A. 921; *Alice Fisher Foster v. Commissioner*, 7 B. T. A. 1137; *Nellie B. McGee v. Commissioner*, 13 B. T. A. 1181, and *F. W. Matthiessen, Jr., v. United States*, decided by the Court of Claims on November 7, 1927 (Commerce Clearing House Federal Tax Service for 1927, vol. 3, page 7535; Certiorari denied 73 L. ed. 21). The United States Circuit Court of Appeals for the Second Circuit reversed the decision of the District Court, so that the Federal courts are now in conflict, the Board of Tax Appeals and the Court of Claims holding in accordance with the plaintiff's claim and the United States Circuit Court of Appeals for the Second Circuit holding to the contrary.

Third. There are the following special and important reasons why a writ of certiorari should be granted:

(*a*) The decision of the Circuit Court of Appeals is in conflict with the decisions of the Board of Tax Appeals and the Court of Claims.

(*b*) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court (U. S. *v.* Jones, 236 U. S. 106).

(*c*) The Circuit Court of Appeals has decided a question of general importance and a question of substance relating to the construction of a statute of the United States, which has not been, but should be, set-

tled by this Court. Counsel for the defendant in their brief before the Circuit Court of Appeals stated that there have been "undoubtedly several hundred thousand of settlements of tax liabilities" involving the construction here in question. Upon information and belief there are now pending numerous cases in the Board of Tax Appeals involving millions of dollars of taxes depending on this identical question. Petitioner's counsel are in receipt of a letter from a firm of attorneys in Detroit, Michigan, stating that they have five cases pending before the Board of Tax Appeals for three clients where about $9,000,000 in additional taxes depends on the question involved in this case.

WHEREFORE your petitioner prays that this Honorable Court will grant its writ of certiorari directed to said Circuit Court of Appeals for the Second Circuit, requiring the complete record of this cause in said court to be certified to this Court, and that this Court will thereupon proceed to correct the errors herein complained of.

And your petitioner will ever pray.

E. FRANKLIN BREWSTER,
Petitioner.

GURDON W. FITCH,
CASTLE & FITCH,
Counsel for Petitioner.

STATE OF NEW YORK,
Western District of New York, ss:

E. Franklin Brewster, being duly sworn, deposes and says that he is the petitioner above named; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

E. FRANKLIN BREWSTER.

Sworn to before me this 22nd day of March, 1929.

[SEAL.] VILAS M. SWAN,
Notary Public.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 807

E. FRANKLIN BREWSTER, PLAINTIFF-PETITIONER,

v.

BERT P. GAGE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT-RESPONDENT.

BRIEF ON BEHALF OF PETITIONER.

This is a petition for writ of certiorari to be directed to the Circuit Court of Appeals for the Second Circuit. The action was brought by the petitioner to recover additional income taxes claimed to have been illegally collected by the defendant. The plaintiff recovered judgment in the United States District Court for the Western District of New York for $2,711.12 (R. 30-31). The opinion of the District Judge is reported in 25 Fed. Rep., 2nd series, at page 915. This judgment was reversed by the Circuit Court of Appeals for the Second Circuit by order entered February 11, 1929

(R. 50). The opinion of the Circuit Court of Appeals appears at page 45 of the record. The sole question involved in the appeal was whether in determining the gain on sales of securities by a residuary legatee the cost of said securities should be taken at their value as of the date of the testator's death or at their value on the date of the Surrogate's order for distribution.

Section 202 (*a*) of the Revenue Act of 1921 provides:

> "(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the far price or value of such property at the time of such *acquisition.*"

Section 213 of the Act of 1918 provides that the term "gross income" does not include

> "(3) The value of property *acquired* by gift, bequest, devise or descent (but the income from such property shall be included in gross income); * * *"

The question involved on this appeal, therefore, depends upon the definition of the word "acquire."

Prior to the decision by the Circuit Court of Appeals the Federal Courts had already four times passed upon this question and in every instance in accordance with the plaintiff's contention.

Appeal of F. W. Matthieson, Jr., 2 Bt. T. A. 921.

Alice Fisher Foster v. Commissioner, 7 B. T. A. 1137.

Matthieson v. U. S. decided by the Court of Claims on November 7, 1927. The opinion of

the Court of Claims has not yet been officially reported, but is set forth in the Commerce Clearing House Federal Tax Service for 1927, vol. III, page 7535 (certiorari denied 73 L. ed. 21).

Nellie B. McGee v. Commissioner, 13 B. T. A. 1181.

Furthermore, the Revenue Act of 1928 has adopted plaintiff's contention as the proper rule. Section 113 contains the following provisions:

> "(5) Property Transmitted at Death.—* * * If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or intestacy, the basis shall be the fair market value of the property at the time of the distributions to the taxpayer."

Point I.

Upon a testator's death, title to personal property not specifically bequeathed, together with the rights to possess, manage and sell, pass to the executor or administrator and not to the legatees.

This old common-law rule has never been changed by statute. The executor or administrator has exclusive legal title to personal property not specifically bequeathed, has the right to possession even as against

legatees, and has the right to sell and transfer a good title free and clear from all claims of creditors or legatees.

One of the leading text writers states the rule as follows (*Schouler on Wills,* sec. 2061):

> "The legal and equitable title to all personal property of the deceased, including choses in action and in corporeal rights, vests in fact in the executor or administrator, as against all the others, during the suitable period for administration, and he holds this property as a trustee and proper representative of all the parties interested herein, wherever such property may be situated, and whether such personalty is in the possession of the deceased at death or is recovered by the representative thereafter."

The New York rule was thus stated by the Court of Appeals in *Peterson v. Chemical Bank,* 32 N. Y. 21:

> "The devolution of ownership is direct to the representative *and the beneficiaries take no title in the specific property which the law can recognize.*"

In *Matter of Zefita,* 167 N. Y. 280, at page 283, the York Court of Appeals quoted with approval from an earlier decision as follows:

> "He had the right to claim the amount of money which his share the residuary estate of Mrs. Fogg would result in, nothing more; no particular piece of property, no particular sum of money, no particular represefitatives of money or property. And until this residuary

> estate was ascertained by an accounting of the executors, the legatee might not be even able to maintain an action for its recovery."

In a recent decision in *State v. Circuit Court of La Crosse County,* 177 Wis. 548, at page 554, the court said:

> "The administrator is the legal owner, for the time being, of the personal property of which the decedent died possessed, and his title and authority extend so completely to all such property as to exclude, for the time being, creditors, legatees and all other beneficiaries interested in the estate."

In *Norton v. Lilley,* 210 Mass. 214, the Supreme Court of Massachusetts said:

> "If an attorney employed by an administrator to help him in the winding up of an estate robs the estate or neglects his duty to it, the administrator in whom is the title to the personal property constituting the estate and with whom the contract in such a case is made by the attorney, is the person who has the right to bring an action for the wrong so done. Such an action cannot be brought by a distributee because he has no title to the personal property. * * * The distributee's right is a right to have the estate properly wound up and distributed."

This Court had occasion to state the rule in the case of *United States v. Jones,* 236 U. S. 106, in which the Court said, at page 112:

> "It hardly needs statement that personal property does not pass directly from a decedent to

> legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. If the estate proves insolvent, nothing is to pass to them. So, in a practical sense their interests are contingent and uncertain till, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly can not be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses."

To be sure, an executor is trustee of personal property for the benefit of creditors and legatees, but in the same manner directors are said to be trustees for stockholders. Yet, when the corporation sells property at more than its cost the stockholders make no gain as individuals.

Point II.

The securities in question were not "acquired" by the plaintiff under the terms of the statute or for income-tax purposes until the surrogate's order of distribution.

The word "acquire" is defined by Bouvier's Law Dictionary as follows:

> "To make property one's own; to gain permanently. It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition. * * *"

There can, of course, be no doubt that a residuary legatee has an immediate interest in testator's estate which he can assign and which will pass under his will or under the laws of intestacy. Furthermore, there is no question but that this interest becomes vested for such purposes on the date of the testator's death. In such a case if a legatee sold such an undivided interest, he would undoubtedly make a profit measured by the difference between the sale price and the value of such undivided interest at the date of testator's death.

On the other hand, as pointed out under Point I, a legatee, except in case of specific legacies, has no legal title to any security or particular item of personal property. Not only has he no legal title, but he has no right of possession or of sale. How then, can he be said to have "acquired" the securities in question?

This distinction between an undivided interest in an estate and the title to specific securities of the estate is clearly pointed out by the Board of Tax Appeals and the Court of Claims in the Matthiessen case. The Board of Tax Appeals in the Matthiessen appeal said, at pages 928 to 929:

> "It is true the taxpayer did acquire a right on the death of the testator, but that right was not a property right in the stock which was the subject matter of the transaction involved in this appeal. The most that the taxpayer,

as residuary legatee, could demand at the time of the death of the testator was a proper administration of the estate and a distribution of such assets as remained after all debts and claims were settled. *Irwin v. Sample*, 72 N. E. 687; *Norton v. Lilley*, 96 N. E. 351; United *States v. Jones, supra; Anderson v. Shepard*, 121 N. E. 215; *In re Waban Rose Conservatories*, 106 N. E. 137.

"From the authorities cited it appears that, although the taxpayer had a right to the proper administration of the estate and to a proportionate share of the residue remaining, he had no right or title in the stock in question until distribution was made by the executors. The date on which he acquired the property in the stock was the date of its distribution, and any amount representing an increase in the value of the stock between the date of the death of the testator and the date of such distribution should not be included in the income of the taxpayer."

The Court of Claims in *Matthiessen v. U. S.* said the same thing in a little different language, as follows:

"Manifestly it requires no more than a mere statement that a residuary legatee under a will acquires an interest in a residuary estate on the date of the death of the testator. It is likewise obvious that he may sell and dispose of the same if he chooses. Whether the legacy is ever received in kind is, of course, dependent upon prior bequests and priority claims against the estate fixed by law. Seemingly it is elementary that until the legatee receives his legacy in possession, vested with absolute control and domin-

> ion over it, capable of asserting ownership against all the world, the contingent interest vesting at the date of the death of the testator is not merged in fee simple title."

Almost the identical question involved on this appeal was decided by the Supreme Court of Vermont in *White v. Waite,* 47 Vermont Reports, 507, where a wife's father died prior to her marriage, but his estate was not distributed until after her marriage. The question arose as to whether the personal property received by her under that distribution was "acquired" during coverture and therefore came within the provisions of the statute relating to property of married women. The Enabling Act of 1867 provided that "all personal property and rights of personal action *acquired* by any married woman during coverture, by inheritance or distribution, shall be held by her to her sole and separate use." In holding that the specific property so received by her was "acquired" at the time of distribution and not at the death of her father the court said:

> "While the right to a distributive share in her father's estate became vested in the daughter immediately upon her father's decease, and she became possessed of an undivided portion of the property of the estate, subject to the rights of the administrator to use a part of the same for the payment of the debts and expenses of administration, yet, the particular property did not become absolutely vested in her, until the decree of the probate court making distribution of the estate, became absolute. Until distribu-

> tion, she had no right as against the administrator, or other heirs, if such there were, to the specific personal property which she afterwards received from the estate. When the decree distributing the estate became absolute, she, in the language of the act, 'acquired' the specific articles of personal property decreed to her, and the right to a personal action for the recovery of the sum of money ordered to be paid to her."

A similar question arose in the case of *Alexander v. Alexander,* 85 Virginia Reports, 353, where the court had to construe the Married Woman's Enabling Act relating to "all property *acquired* by her before and during marriage." In this case the wife by the terms of her father's will was given a vested remainder in real estate after a life use, which was devised to her mother. Her father died before her marriage but as her mother did not die until after her marriage, she did not go into possession of the property until after her marriage. The court held that the property was not acquired until she received possession, citing *White v. Waite, supra.*

Counsel for defendant in his brief in the Circuit Court referred to a line of cases which merely relate to the undivided interest in the estate, which, of course, unquestionably vests at the time of the death of the testator and may be assigned by the legatee and in case of his death passes under his will. None of these cases, however, relate to the vesting of the legatee's interest in any particular security.

Point III.

Executors and administrators are considered as owners of personal property for purposes of taxation.

It has been uniformly held by the various states that personal property of an estate for purposes of direct taxation must be assessed to the executor or administrator.

Eliot v. Prime, 98 Me. 48.
Herrick v. City of Big Rapids, 53 Mich. 554.
Vaughn v. City Commissioners, 154 Mass. 143.
Brown v. Noble, 42 Ohio State 405.
Baldwin v. Shine, 84 Ky. 512.

Congress itself has recognized the executor's title to personal property by providing that during administration the income thereon shall be reported and the tax thereon paid by the executor or administrator. Sec. 219 of the Revenue Act of 1918 provides:

> "(*a*) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including
> (1) Income received by estates of deceased persons during the period of administration or settlement of the estate."

As pointed out by the Board of Tax Appeals in the Matthiessen case:

> "From these provisions it appears that Congress recognized that the property of a decedent vested in the executor or personal representative during the period of administration and

> provided, in order that such estates might not escape taxation, that any gain derived during such period should be paid by such executor or personal representative."

How can securities of an estate in process of administration be said to belong to the legatees if the income thereon is taxable to the executor and if profits on sales thereof by the executor are taxable against the estate?

Point IV.

The construction adopted by the District Court leads to no more difficulties or inconsistencies than that contended for by the plaintiff.

Defendant raises the objection that under the rule adopted by the District Court the Government will receive no income tax on the increase in value between the time of testator's death and the date of distribution. The same is true as to the increase in value between the time securities are purchased and the value at the time of testator's death. While the Treasury Regulations provided that this appreciation was taxable, the courts held that it was not. Likewise, prior to December 31, 1920, there was no tax on the increase in value of securities between the time they were purchased by a donor and the date of their gift to the donee. However, the fact that there may be income upon which the Government receives no tax is no reason for putting a strained construction on the statute. As said by Chief Justice Taft in *Smietanka v.*

First Trust & Savings Bank, 257 U. S. 602, at page 606:

> "It may be that Congress had a general intention to tax all incomes, whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication."

Difficulties surrounding an adoption of the defendant's contention will lead to much greater inconsistencies than those pointed out by him. Suppose, for example, on distribution a legatee accepts in lieu of cash securities then worth $50,000 but which were appraised at only $10,000 on the date of testator's death. If the legatee later sold these securities for $50,000, under the defendant's theory he would be making a profit of $40,000 and this in the face of the statute, Sec. 213 of the Revenue Act above quoted providing that legacies are exempt from income tax. On the other hand, suppose that the securities so received on distribution at a valuation of $50,000 were worth $150,000 at the time of testator's death. On defendant's theory the legatee would thereby suffer a deductible loss of $100,000.

Again suppose that one of the residuary legatees purchases securities from the executor. Under the defendant's theory what would be the cost of these securities?

Obviously none of the objections raised by defendants or in the opinion of the Circuit Court of Appeals seemed serious to Congress since in the Revenue Act of 1928 it adopted the rule contended for by the plaintiff (Sec. 113 above quoted).

POINT V.

Congress is not bound by constructions placed by the Treasury Department on the revenue acts of former years.

The opinion of the Circuit Court of Appeals points out that the Treasury Department in construing the acts since 1913 has consistently ruled in accordance with defendant's contention. There is no evidence of these rulings in the record, though the Court probably can take judicial notice thereof. While "great weight" might properly be given to "long continued" construction of statutes by department officials, it should be borne in mind that Treasury rules in the last few years have changed so rapidly that it is almost impossible to keep up with them. In any event, as pointed out by this Court in *U. S. v. Finnell,* 185 U. S. 236, "If the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge."

Many times after Congress has re-enacted the income tax provisions of former acts which have been construed by the Treasury decisions, the Commissioner has not hesitated to revise his rulings, even making them retroactive. To give only one of many examples,

Regulations 33, Article 8, related to the purchase of mortgaged property by a mortgagee upon foreclosure sale. After these regulations were in force the Acts of 1918 and 1921 were passed re-enacting the provisions of the Act of 1913. Yet on December 21, 1921, by T. D. 3264, the Commissioner purported to amend those regulations 33 making them retroactive to 1913.

Conclusion.

A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 61.

E. FRANKLIN BREWSTER,
Petitioner,

against

BERT P. GAGE, Collector of Internal Revenue,
Respondent.

BRIEF ON BEHALF OF PETITIONER.

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IN THE

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OCTOBER TERM, 1929.

E. FRANKLIN BREWSTER,
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against

BERT P. GAGE, Collector of Internal Revenue,
Respondent.

No. 61.

BRIEF ON BEHALF OF PETITIONER.

This case comes before the Court on a writ of *certiorari*, issued to the Circuit Court of Appeals for the Second Circuit, in accordance with the order entered May 13, 1929 (R. 33), granting the petition that had been filed on April 4, 1929.

The case involves the right of the petitioner to recover Federal income taxes for the calendar years 1920, 1921 and 1922, claimed by him to have been illegally assessed and collected. In each of those years the petitioner sold certain stocks which he had acquired as one of the five residuary legatees under his father's will. He computed the gains and losses resulting from such sales upon the basis of the value of the securities on April 19, 1920, the date of the order of distribution, but the Commissioner of Internal Revenue recomputed such gains and losses upon the basis of the value on May 20, 1918, the date of the testator's death.

This action was brought to recover such additional taxes paid. The petitioner obtained a judgment in the United States District Court for the Western District of New York, for the sum of $2,711.12 (R. 18, 19), the opinion being re-

ported in 25 Fed. (2nd) 915. The judgment of the District Court was reversed by the Circuit Court of Appeals for the Second Circuit by its order entered February 11, 1929 (R. 30, 31), the opinion being reported in 30 Fed. (2nd) 604.

Statement of the Facts.

The petitioner was one of five residuary legatees under the will of his father, who died May 20, 1918. On April 19, 1920, there was entered in the Surrogate's Court, County of Monroe, City of Rochester, New York, a decree or order of final distribution, whereby the executors were directed to distribute certain property, including the securities subsequently sold, to the petitioner and the other residuary legatees. The distribution of these securities was in lieu of cash payments. The description of the securities sold by petitioner, the years of sale, the sale price, their value at the date of testator's death, and their value at the date the order of distribution was entered, April 19, 1920, were as follows (R. 5, 11, 12):

	Securities	Year Sold	Sale Price	Value at Testator's Death	Value Apr. 19, 1920
22 shs.	Eastman Kodak....	1920	$11,550.00	$9,350.00	$12,100.00
25 "	Lincoln Bank.....	1920	6,250.00	5,500.00	6,875.00
15 "	Am. Chicle pfd.....	1920	944.40	945.00	1,080.00
66 "	Childs Co. com.....	1921	6,257.46	4,290.00	5,940.00
22 "	Bankers Trust Co.	1922	8,024.72	5,398.58	8,514.00
60 "	Gen'l Cigar Co. com. (United Cigar Stores)	1922	4,631.10	2,700.00	4,140.00

These securities were revalued on April 19, 1920, the date of distribution, and it was stipulated that such values were the actual market values on that date (R. 22).

The petitioner reported as the taxable gain realized or the deductible loss sustained upon each of the above sales, the difference between the selling price and the value of the securities at the date of the order of distribution. The Commissioner of Internal Revenue increased the taxable gains and decreased the deductible losses by computing such gains and

losses in each case as the difference between the selling price of the securities and their value at the date of the testator's death. As a result of the adjustments made by him the Commissioner assessed against the petitioner additional taxes for the three years in question as follows: $1,799.68 for 1920; $94.94 for 1921; and $453.59 for 1922, or a total of $2,348.21 (R. 4). This sum, with interest in the amount of $53.69, was paid under protest (R. 4). A claim for the refund of the aforesaid additional taxes and interest, with interest thereon from the date of payment, was duly filed by the petitioner with the Collector and was rejected in its entirety by the Commissioner (R. 4).

Prior to December 31, 1919, the executors had realized net profits on sales in the amount of $50,993.84, and other income in the amount of $77,955.92. During the same period the executors disbursed $336,887.15 for debts; $78,303.03 for estate and inheritance taxes, and $758.38 administration expenses (R. 8).

Likewise, prior to December 31, 1919, partial distributions valued at $567,832.80 (R. 8, 23, 24), were made to the five residuary legatees. However, each legatee's share was not made up of the same items of property. Petitioner received one thousand shares of the common Stock of Brewster Gordon & Company, while the other four legatees received one thousand shares each of preferred stock of that company. Petitioner also received certain cash, silverware, and jewelry, while the other legatees, in lieu thereof, each received certain stocks. The three daughters each received one-third of the household furniture, whereas the two sons received none (R. 23, 24).

During the period January 1, 1920 to April 19, 1920, the executors received income amounting to $10,776.25, and paid debts amounting to $15,174.77 (R. 9), administration expenses and attorneys' fees $25,683.93 (R. 10), and executor's fees $41,951.22 (R. 11).

The Issue Involved.

The sole issue presented is whether the stocks which Brewster sold were acquired by him, within the meaning of Section 213(b) (3) of the Revenue Acts of 1918 and 1921 and Section 202(a) (3) of the Revenue Act of 1921, at the date of the decree of distribution or at the date of the testator's death.

Statutes Involved.

Revenue Act of 1918 (40 Stat. 1060, 1065).

Section 213:

"* * * The term 'gross income'—

(a) includes gains, profits and income derived from * * * commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever; but

(b) Does not include the following items which shall be exempt from taxation under this title:

* * * * * * * *

(3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income); * * *."

Section 202(a):

"That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

(2) In the case of property acquired on or after that date (a) the cost thereof; or (b) the inventory value if the inventory is made in accordance with section 203."

Revenue Act of 1921 (42 Stat. 229, 237).

Section 213:

"* * * The term 'gross income'—

(a) includes gains, profits, and income derived from * * * commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever; but

(b) Does not include the following items which shall be exempt from taxation under this tile:

* * * * * * * *

(3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income); * * *."

Section 202(a):

"That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * *

(3) In the case of such property, acquired by bequest or devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition."

SYNOPSIS OF ARGUMENT.

I.

The stocks which Brewster sold constitute the property, the basis of which is to be determined, and such stocks were acquired by him on April 19, 1920, the date of the order of distribution, not on May 20, 1918, the date of the testator's death.

A. *The "Property" to which Section 202(a) (3) Refers is the Specific Property Sold by the Residuary Legatee.*

B. *The Time of "Acquisition" of "Such Property" was the Date of the Order of Distribution, and is to be Distinguished from the Acquisition of the Mere Right to a Proper Administration of the Estate which Vested at Death.*

C. *To Hold that the Property Sold was Acquired at the Date of Testator's Death would Result in Increasing or Decreasing a Taxpayer's Income on account of Changes in Value before the Property is Subject to the Disposition and Control of such Taxpayer. This Should Not be Done in the Absence of Clearly Expressed Congressional Intent.*

II.

The legislative history of the statutes in question fully supports the petitioner's construction.

III.

The departmental construction is entitled to no weight in construing the statutes here involved.

IV.

The decision below is not sound; and its construction of the statute leads to inconsistencies and confusion that do not arise under the proper construction.

ARGUMENT.

I.

The stocks which Brewster sold constitute the property, the basis of which is to be determined, and such stocks were acquired by him on April 19, 1920, the date of the order of distribution, not on May 20, 1918, the date of the testator's death.

The Revenue Act of 1918 applies to the year 1920 and the Revenue Act of 1921 applies to the years 1921 and 1922. There is a difference in the language of the two acts in that the basis provisions of the 1921 Act, Section 202(a) contain specific reference to the basis for determining gain or loss upon the sale of property acquired by bequest whereas no such specific reference is found in the 1918 Act. The only basis specifically mentioned in the 1918 Act for property acquired after March 1, 1913, is cost, and in a case of this kind there is no cost in the literal sense of the word. However, the entire proceeds of sale of a bequest does not constitute income because the value of a bequest is capital to a legatee and becomes the basis for determining whether there has been a gain or loss when the bequest is subsequently sold. The additional provision found in the 1921 Act, namely, Section 202(a) (3), is new and serves to make the statute clearer and more definite by specifying that the basic value of property acquired by bequest is its value when acquired. It can hardly be doubted that, whatever may be the conclusion reached under the 1921 Act, it must rationally be the proper conclusion to be reached under the 1918 Act, and it is not apprehended that the Treasury Department is of a different mind.

In view of what has been said above, and of the language of Section 202(a) (3) of the 1921 Act, it is apparent that the narrow question to be answered is: When were the stocks which Brewster sold in 1920, 1921, and 1922 "acquired" by him within the intendment of the statutes here involved?

A.

The "Property" to which Section 202(a) (3) Refers is the Specific Property Sold by the Residuary Legatee.

The language of the statute is explicit with regard to the property to be valued. After stating the general rule that the basis for ascertaining the gain or loss upon a sale of any "property" shall be the cost of "such property", it provides:

> "In the case of such property, acquired by bequest, devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition."

The repeated use of the word *such* modifying *property* and in each instance referring back to the property sold is significant. Without the word *such* in the statute, the ordinary meaning of its language undoubtedly is that the basis to be used in measuring the gain resulting from the sale of property is the cost or basic value of the self-same property that was sold. The use of *such* not only strongly emphasizes that which is obvious, but also goes further and indicates a concern of the law-makers to exclude the possibility of any other or different property whatsoever. This is but proper because, in the absence of some compelling reason, it would be anomalous to permit an inference that the selling price of one article or of one kind of property should be compared with the cost or value of another article or another kind of property in order to ascertain gain or loss. Therefore, the "property", the basic value of which is contemplated by Section 202(a) (3) is the specific property which was sold by the legatee.

B.

The Time of "Acquisition" of "Such Property" was the Date of the Order of Distribution, and is to be Distinguished from the Acquisition of the Mere Right to a Proper Administration of the Estate which Vested at Death.

The meaning of the word *acquire* is not doubtful. Both in common speech and as understood in the law, it means to obtain or receive possession and enjoyment of, to get as one's own.

Webster's Dictionary, Unabridged, thus defines the word:

> "To gain by any means; to *get as one's own,* as to acquire a title." (Italics ours.)

Funk & Wagnalls Dictionary gives this definition:

> "To obtain by search, endeavor, practice, or purchase; *get as one's own;* receive or gain in whatever manner; come to have; * * * ." (Italics ours.)

Bouvier's Law Dictionary defines it as follows:

> *"To make property one's own;* to gain permanently. It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition." (Italics ours.)

The Supreme Court of California in the case of *Wulzen* v. *Board of Supervisors,* 101 Cal. 15, 25; 35 Pac. 353, gives this definition:

> " 'To acquire' is, in the law of contracts and descent, *to become the owner of properties; to make property one's own.*" (Italics ours.)

See also: *Ex parte Okahara,* 191 Cal. 353, 216 Pac. 614; *White* v. *Waite,* 47 Vt. 502; *Alexander* v. *Alexander,* 85 Va. 353, 7 S. E. 335; *Matthieson* v. *United States,* 65 Ct. Cls. 484; *Appeal of City Bank Co.,* 1 B. T. A. 210; *Appeal of Matthieson,* 2 B. T. A. 921; *Foster* v. *Commissioner,* 7 B. T. A.

1137; *Moser* v. *Commissioner,* 12 B. T. A. 672; *McGee* v. *Commissioner,* 13 B. T. A. 1181.

Common to all of the above definitions is the idea of making property one's own; and to make property one's own obviously means to become owner of it, to possess it fully, free from any adverse interests of others. And a necessary and indispensable attribute of ownership is the power of disposition.

The specific property sold was not *acquired* by the petitioner when his father died. The long settled common law rule, which has never been changed by any statute or decision affecting this case, is that upon a testator's death, title to personal property not specifically bequeathed, together with the possession, right to collect income therefrom and power to sell, passes to the executor or administrator and not to the residuary legatees, but indeed to the exclusion of such legatees.

> *United States* v. *Jones,* 236 U. S. 106, 112 (1915);
> *Williams* v. *Cobb,* 242 U. S. 307 (1916);
> *Petersen* v. *Chemical Bank,* 32 N. Y. 21, 45 (1865);
> *Matter of Zefita,* 167 N. Y. 280, 283, 60 N. E. 598 (1901);
> *Norton* v. *Lilley,* 210 Mass. 214; 96 N. E. 351 (1911);
> *State* v. *Circuit Court of LaCrosse County,* 177 Wis. 548, 554; 188 N. W. 645 (1922);
> *Schouler on Wills* (6th Ed.), Section 2061;
> *Alexander, Commentaries on Wills* (Vol. 3), Section 1461.

The principle was stated by this Court in *United States* v. *Jones, supra,* as follows:

> "It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. * * * In a practical sense their in-

terests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly cannot be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses."

This Court further said, in *Williams* v. *Cobb, supra*, that—

"At common law * * * an executor has full power, without any special provision of the will that he is administering or order of the court, to sell or dispose of the personal assets of the estate, and thereby to pass good title to them."

Schouler says, in Section 2061:

"The *legal and equitable* title to all the personal property of the deceased, including choses in action and incorporeal rights, vests in fact in the executor or administrator, as against *all* others, during the suitable period for administration. * * *." (Italics ours.)

Alexander in his *Commentaries on Wills, supra,* in Section 1461, says:

"The general rule is that the legal title to all personal property of a decedent, including all chattel interests and choses in action, vests in the personal representative, as of the date of the death of the decedent; and *such personal representative has the title and right of possession thereto against the next of kin and legatees until the end of administration and final distribution.*" (Italics ours.)

The New York rule, under which the case at bar arose, is stated in *Petersen* v. *Chemical Bank, supra,* at page 45, as follows:

"The devolution of ownership is direct to the representative, and the beneficiaries take no title in the specific property which the law can recognize."

In contradistinction to the title and rights to possession, usufruct, and disposition, held by the personal representative during the period of administration, the residuary legatee during such period has no title to the personal property and none of the rights which are fully possessed by the personal representative. All that a residuary legatee takes at death is an intangible and unattached right to demand and receive at some time in the future whatever, if anything, may remain after paying taxes of every nature, debts, sundry expenses of administration, and all the other testamentary gifts.

It is noteworthy that, throughout the quotations given above, the exclusion of the legatees from any title is emphasized. In keeping are the following, pointing out the limitations of the right which the residuary legatees acquire upon a testator's death:

United States v. *Jones, supra:*

> "In a practical sense, their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly cannot be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses."

Petersen v. *Chemical Bank, supra:*

> "* * * the beneficiaries take no title in the specific property which the law can recognize."

Matter of Zefita, 167 N. Y. 280, at 283, points out that a residuary legatee could not even maintain an action for recovery of property of the estate which had been converted.

Likewise, *Norton* v. *Lilley,* 210 Mass. 214, holds that if an attorney employed in the administration of an estate robs the estate or neglects his duty to it, "an action cannot be brought by a distributee because he has no title to the personalty

* * *." The distributee's right is merely a "right to have the estate properly wound up and distributed."

It was said in substance, in the opinion below, that at death a residuary legatee acquires equitable title to the property which may eventually be distributed to him. This statement is wholly inconsistent with the authorities. In this connection see particularly *Schouler on Wills,* Section 2061:

> "The *legal and equitable* title to all the personal property * * * vests in fact in the executor or administrator, as against *all* others, during the suitable period for administration * * *." (Italics ours.)

See also, 17 *Columbia Law Review,* 467, where it is maintained that even in the case of a true trust the *cestui* has only a right *in personam* and no right *in rem.*

It may be freely conceded that Brewster acquired something at the date of death, for at that time he acquired a right to an honest administration of the estate and a vested right to participate eventually in the residuum if there should be any. This right is in itself property and if he should sell it his gain or loss would be based upon the value of such right at the time he acquired it, the date of death. *But this right is not the "property", the stocks, which were distributed to him and which he sold in 1920, 1921 and 1922.*

The narrow question of whether specific property, as distinguished from an intangible right to ultimate distribution, was "acquired" by a legatee at testator's death, was considered in *White* v. *Waite, supra,* in which the court was construing the Enabling Act of 1867, which provided that, "All personal property and rights of personal action *acquired* by any married woman during coverture, by inheritance or distribution, shall be held by her to her sole and separate use". It was held that the property received by her was "acquired" at the time of distribution and not at the date of death.

In *Alexander* v. *Alexander, supra,* the Supreme Court of Appeals of Virginia, construing a similar act relating to "all property *acquired* by her during marriage"

held that where a wife was given a vested remainder in real estate and the testator died before her marriage, but the life tenant did not die until after her marriage, she "acquired" the property within the meaning of the statute when she came into possession and not when her remainder vested.

Even if, notwithstanding the foregoing authorities, it could be said that a residuary's right to an honest administration and eventual participation in the residuum constituted an equitable interest in the property held by the executor it would not follow that the property sold by Brewster was *acquired* within the meaning of the income tax acts at the date of death instead of at the date of distribution. In no economic sense was Brewster the owner of the stocks in question while they were beyond his right of enjoyment and power of disposition, subject to sale for debts, and might well have been distributed to some other legatee. The practical matter of taxation should not, in the absence of clear Congressional intent to the contrary, be made to depend upon intangible concepts and theories as to which experts do not agree.

C.

To Hold That the Property Sold Was Acquired at the Date of the Testator's Death Would Result in Increasing or Decreasing a Taxpayer's Income on Account of Changes in Value of Property Before It Is Subject to the Disposition and Control of Such Taxpayer. This Should Not Be Done in the Absence of Clearly Expressed Congressional Intent.

Taxation is eminently practical. It is brought to every man's door and should not depend upon the application of theoretical or abstract ideas which are the subject of dispute and controversy among experts. *Knowlton* v. *Moore,* 178 U. S. 41; *Nicol* v. *Ames,* 173 U. S. 509, 515; *Vanderbilt* v. *Eidman,* 196 U. S. 480. Whether one of several residuary legatees has, during the period of administration, an equitable title to any or all of the property which eventually falls into the residuum is theoretical and controversial. But there is

no controversy over the proposition that during such period he has no right whatever to possess, sell or enjoy any property held by the personal representative and is incapable of designating or identifying which property, if any, shall be distributed to him at the conclusion of administration. The court below has made the measure of a residuary legatee's taxes dependent upon a highly theoretical and controverted concept. On the other hand, the Court of Claims in one case and the Board of Tax Appeals in four cases, both with a background of hearing many tax controversies, have declined to so measure a residuary legatee's tax and have confined the measure to the actual, practical situation by basing the gain or loss upon the value at the date of distribution. *Matthieson* v. *U. S., supra; Appeal of Matthieson, supra; Foster* v. *Commissioner, supra; Moser* v. *Commissioner, supra; McGee* v. *Commissioner, supra.*

In the *Matthieson* case the Court of Claims said, page 496:

> "It is difficult to conceive that Congress, in using the language 'the value of property acquired by * * * bequest', intended to fix irrevocably a value at the date of testator's death when by the very nature of the event it was incapable of ascertainment, speculative, and dependent finally upon a course of legal proceedings which must be first observed before it may be fixed."

In the case of the same name the Board of Tax Appeals had the following to say:

> "From the authorities cited it appears that, although the taxpayer had a right to the proper administration of the estate and to a proportionate share of the residue remaining, he had no right or title in the stock in question until distribution was made by the executors. The date on which he acquired the property in the stock was the date of its distribution, and any amount representing an increase in the value of the stock between the date of the death of the testator and the date of such distribution should not be included in the income of the taxpayer."

Then after pointing out that any income realized during the period of administration is taxable to the estate under Section 219 of the Acts, the Board continued:

> "With reference to the stock in the instant case there was no transaction prior to distribution from which taxable gain resulted, even though it is clear that its value increased during that period and was greater at the time of the distribution than at the time of the death of the testator. This does not affect the income of the taxpayer, inasmuch as Section 213 of the Act excludes from gross income the value of the property as of the date it was acquired, which was the date of distribution."

In the *McGee* case the Board was required to consider the effect of a California statute which vested title to all personalty in the heirs subject to the possession of the personal representative and to the lien for expenses, taxes and debts. Its conclusion is found at page 1183:

> "'Acquisition', as that word is used in Section 202(a)(3), means when the legatee receives his legacy in possession vested with the absolute dominion and control over it as distinguished from a contingent interest he may have had at the date of death of the testator."

Early in its history the Board was required to determine whether the practical condition of ownership should control in ascertaining when property was *acquired* within the meaning of the basis provisions of the 1918 Act. In *Appeal of City Bank Company,* 1 B. T. A. 210, the taxpayer had bid in property at a judicial sale prior to March 1, 1913; but the sale was not approved by the Court until after that date. The value at March 1, 1913, was much higher than the cost and when the taxpayer sold the property in 1920 he sought to obtain this value as the basis for computing his gain by claiming that he had acquired the property at the judicial sale prior to March 1, 1913. But the Government had held that he did not acquire the property until all contingencies were removed by the Court's approval of the sale and there-

fore his *acquisition* was after March 1, 1913, and his basis was the cost of the property. In his brief the Solicitor of Internal Revenue admitted that title related back to the date of the sale, but contended, and quite properly, that the acquisition was when "the taxpayer had an unconditional and indefeasible right to the property in question" (see, *infra*, p. 28). The Board sustained the position of the Department.

In sustaining the Department's interpretation of the term "acquisition", the Board was recognizing and yet properly limiting the application of the fundamental theory under which profits from the sale of property are considered as taxable income. As this court has repeatedly indicated, only the actual gains and losses of a taxpayer may be taxed or deducted; *Goodrich* v. *Edwards*, 255 U. S. 527, 41 S. Ct. 390; *Walsh* v. *Brewster*, 255 U. S. 536, 41 S. Ct. 392; *United States* v. *Flannery*, 268 U. S. 98, 45 S. Ct. 420; *McCaughn* v. *Ludington*, 268 U. S. 106, 45 S. Ct. 423. To tax increments in value occurring prior to the time the taxpayer obtains dominion over the property is to tax something more than his actual gain. Congress has invariably adopted this theory of measuring the gain or loss with one or two minor exceptions, such as the case of gifts where a different basis was prescribed to correct a very real and notorious abuse. It is peculiarly significant that when Congress deemed it necessary to provide that the basis of one taxpayer should become the basis of another, as in the case of donor and donee (see *Taft* v. *Bowers*, 278 U. S. 470), it devoted a separate subdivision of the statute to that purpose and employed clear and unequivocal language (Section 202(a) (2), 1921 Act). Certainly, in the absence of any clearly expressed intent on the part of Congress to prescribe a different rule, the basis for taxation should be the value of the property when for the first time complete dominion attaches, rather than some arbitrary basis such as the Department is endeavoring to apply in the present case.

The reasoning of the Department seems to approach this question from the viewpoint that the so-called exemption of

the value of bequests is to be strictly construed. But irrespective of the statute the values of bequests and devises are not income and have never been so considered. In this respect they are entirely similar to the proceeds of life insurance paid at death as to which this Court, construing Section 213(b), 1918 Act, said that the word *exempt* is used only to make clear that gross income does not include such proceeds and is not used to indicate that they would otherwise be included in taxable income. *U. S.* v. *Supplee-Biddle Hdw. Company,* 265 U. S. 189.

The value of property acquired by bequest, devise or inheritance constitutes in fact capital of the legatee or devisee. It is no doubt quite proper to treat the value of real estate and specific bequests at date of death as such capital. As to the former, it vests immediately at death, is not ordinarily a part of the estate for purposes of administration, and at death is identified definitely as going to the persons designated by will or intestate laws. As to specific bequests, both the property and the legatee are identified with each other at death. It is not subject to sale by the representative except when all other personalty is inadequate, no other legatee can possibly get it and its change in value during administration has no bearing upon the specific legatee's rights.

Altogether different, however, is that which a residuary legatee takes, particularly if he is one of several. In this case, for example, there was a gross estate of approximately $1,300,000 (R. 8). At the date of death there existed liabilities for taxes, debts, and sundry expenses in unknown amounts. Such liabilities were eventually found to be approximately $500,000 (R. 8, 9, 10, 11). It was not until such charges against the residuum were ascertained and satisfied that the existence of any residuum at all could be determined. During the process and period of administration and until the Court ordered distribution, in every practical sense, Brewster had no right to or interest in any specific item of property which constituted the residuum of the estate. He could not demand, control, enjoy or sell any property and possessed only the right to demand an hon-

est administration and eventual distribution to him of one-fifth of what might be left. *Furthermore, each item of property set apart to him in the order of distribution in fact was, and by law was required to be, charged to him at its value on the date of the order.* In no other way could an equal partition of the residuum be effectuated. Accordingly, in a very real and practical sense the value at the date of distribution, the value at which the property was charged to him, constituted his capital. To tax him upon any other basis than that value would subject him to conditions which transpired during a period when another taxpayer, the estate, was in possession and control of the property and liable to pay the income tax on any income realized from it (Section 219, Revenue Acts, 1918, 1921). To allow him a loss on any other basis would be in fact to allow a loss never sustained by him. It is altogether repugnant to any concept of income to measure Brewster's income by changes in value of the property during a period when he had no power of disposition over it.

II.

The legislative history of the statutes in question fully supports the petitioner's construction

In considering the legislative history having a bearing upon the matter in controversy, it is necessary to examine the statutory provisions with respect to gross income as well as those relating to the basis to be used in determining the gain or loss resulting from the sale of property.

The broad definition of gross income found in the first income tax statute, the Revenue Act of 1913, has not been changed in any respect here significant in the numerous revenue acts enacted to this date. In each of the acts there has been excluded from gross income and exempted from the income tax "the value of property acquired by gift, bequest, devise, or descent." The only change whatsoever occurred in the 1926 Act when the word "descent" was changed to "in-

heritance" and this change was retained in the 1928 Act. It is without significance. (Section II-B, Revenue Act of 1913; Section 4, Revenue Acts of 1916 and 1917; Section 213(b), Revenue Acts of 1918, 1921 and 1926; Section 22(b), Revenue Act of 1928.)

In all of the revenue acts, except that of 1913, in which no specific provision is found, the general rule as to basis has been that the basis for determining gain or loss from the sale of property is the cost of such property if it was acquired after March 1, 1913, and the value of such property at March 1, 1913, if it was acquired prior to that date. (Section 2(c), Revenue Acts of 1916 and 1917; Section 202(a), Revenue Acts of 1918 and 1921; Section 204(a), Revenue Acts of 1924 and 1926; Section 113(a), Revenue Act of 1928.)

Every exception or addition to that general rule has been to serve one of three purposes, namely: First, to harmonize the basis rule with other parts of the statute such as provisions relating to inventory, tax-free exchanges, tax-free corporate reorganizations and wash sales; Second, to prevent the escape from taxation of gains that Congress intended should be taxed; and, Third, to clarify the statutes.

Thus, in Section 202 of the 1918 Act appear provisions as to the basis in case of property that had been reported in inventory, property received without taxation in exchange for other property, and in tax-free reorganizations. All of these additions or exceptions fall within the first class aforementioned. In the subsequent acts the provisions regarding basis in connection with exchanges and corporate reorganizations become more elaborate as the other provisions of the statutes dealing with those subjects become more elaborate.

Under the 1918 and prior acts, there was nothing to prevent a taxpayer from making a gift to a member of his family of property greatly enhanced in value and about to be sold, thus permitting the donee to make the sale and avoid the realization of taxable gain. Accordingly, in the 1921 Act an exception to the general rule makes the basis to a donee the same as it would have been to the donor had he sold the property (Sec. 202(a) (2)). In the 1924 and subsequent

acts, this exception preventing escape from taxation is extended to property transferred in trust, other than transfers in trust by bequest or devise. (Sec. 204(a) (3), Revenue Acts, 1924, 1926.) These provisions of the 1921, 1924 and subsequent acts fall within the second class as preventing escape from taxation of gains intended by Congress to be taxed.

In the 1921 Act, subparagraph (3) of Section 202 (a) hereinbefore quoted, was added. This was for the purposes both of clarifying and harmonizing the basis provisions with Section 213, which excludes "the value of property acquired by * * * bequest * * *" from taxation as income. This provision was retained and reenacted in the 1924 and 1926 Acts. If Congress intended to adopt any such construction as the Department here urges, it would certainly have employed the obvious means of doing so by providing that the basis shall be the value at the date of death. Furthermore, when the section was reenacted in 1926 the Board of Tax Appeals had decided the *Matthieson* case, *supra,* in 1925 and held that the basis is the value at the date of distribution. (See *infra,* p. 29.) By the time the 1928 Act was passed, the Board, in the *Foster* case, had reiterated its position, the Court of Claims, in the *Matthieson* case, had followed the Board, and the District Court had decided this case, all contrary to the construction now asked by the Department. And when Congress came to re-enact the provisions here under consideration it spelled out its intention in a fashion that would leave no room whatsoever for doubt. This provision appears as Section 113(a) (5) of the Revenue Act of 1928, which specifically provides that the basis in the case of personalty acquired by specific bequest, or realty acquired by general or specific devise, or intestacy, shall be the value at the time of death, but that in *all other cases, the basis shall be the value at the time of distribution.*

In its broad definition of gross income which Congress has repeatedly reenacted without substantial change, it intended, as this Court has said, to use its power to tax income to the full extent. *Irwin* v. *Gavit,* 268 U. S. 161; *Eisner* v. *Ma-*

comber, 252 U. S. 189, 203. Adhering throughout, as it has done, to the same broad definition, Congress has not given evidence of any intention to lessen its purpose to tax all income. This is certainly true in cases where the income is derived in the form of cash proceeds from the sale of property. If, as the Department contended below, petitioner's construction results in the escape from tax of income intended to be taxed, then it is impossible to explain why Congress, in the 1928 Act, opened a way of escape, contrary to its consistent policy of closing all ways of escape. The rational explanation is that Congress never intended to tax this enhancement or to allow losses measured by corresponding declines and that the 1928 Act merely provides more definitely that which it had always intended but as to which doubt had arisen by reason of the conflicting views of the Department on the one hand and the Board of Tax Appeals, the Court of Claims, and the District Court in this case, on the other hand.

Fully in keeping with this view is the explanation of the change given by the Senate Finance Committee in its report. After reciting the confusion that had arisen the Committee goes on to say:

> "Accordingly, the Committee has revised Section 113(a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. *In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the*

executor purchases property and distributes it to the beneficiary." (Senate Report No. 960, p. 26.) (Italics ours.)

Section 113(a) (5) of the 1928 Act deals with precisely the same subject matter as Section 202(a) (3) of the 1921 Act, here in controversy, and the identical provisions of the 1924 and 1926 Acts. Where, from a subsequent statute *in pari materia*, it may be ascertained what meaning the law makers attached to the words of a former statute, the subsequent statute will govern the construction of the earlier statute.

United States v. *Freeman*, 3 How. 556 (1845);
Alexander v. *Alexandria*, 5 Cranch 1, 8;
United States v. *Coulby*, 251 Fed. 982 (1918); Aff'd (C. C. A. 6) 258 Fed. 27 (1919);
Joy Floral Co. v. *Commissioner*, 29 Fed. (2nd) 865 (1927) (Ct. Appeals, Dist. of Col.).

In the *Alexandria* case, *supra*, Chief Justice Marshall said:

"* * *, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

In the *Freeman* case, *supra*, this Court said:

"If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; Lord Raym. 1028; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. (*Morris* v. *Mellin*, 6 Barn. & Cress. 454; 7 Barn & Cress. 99.)"

III.

The departmental construction is entitled to no weight in construing the statutes here involved.

The Department will no doubt urge, as it did below, the rules that long continued, consistent departmental construction is entitled to great weight; and that when a statute is re-enacted after such construction by the Department it is indicative of Congressional approval. *Provost* v. *U. S.*, 269 U. S. 443; *National Lead Co.* v. *U. S.*, 252 U. S. 140; *U. S.* v. *Falk*, 204 U. S. 143.

But there has been no long continued or consistent departmental construction of the statutes here involved; and in fact there was no published departmental regulation or ruling prior to the enactment of the 1926 Act, placing any construction on Section 202(a) (3) of the 1921 Act.

As pointed out in the legislative history above, Section 213(b) (3) or its equivalent has appeared in all of the Revenue Acts without substantial change; but Section 202(a) (3) of the 1921 Act had no equivalent in the prior acts, was re-enacted without change in the 1924 and 1926 Acts, and was revised in the 1928 Act.

Construction Under the 1913 Act.

Article 5 of Regulations 33 (1914 Edition) provides:

> "The following items shall not be included as gross income; (a) value of property acquired by gift, bequest, devise or descent during the year."

There is no other regulation on the subject. There is, however, a ruling by Commissioner Roper, contained in a letter dated December 3, 1914, to the Collector of Internal Revenue, in which he answers certain questions which were propounded in a letter from Masten & Nichols. Among the

questions was a request for advice as to how a beneficiary under a will, who sold certain securities acquired by bequest, should calculate his gain or loss. On this point, the Commissioner's letter is as follows:

> "You are advised and will so inform Messrs. Masten & Nichols, that if such securities are sold by the beneficiary at a price greater than the *appraised value placed upon them in the settlement of the estate,* the gain in value is held to be income to him and subject to tax under the provisions of the Federal Income Tax Law * * *.
>
> However, if securities belonging to an estate are sold *prior to the settlement of the estate* by the administrators or trustees at a price greater than their cost price to the estate, the amount of gain derived from the transaction is considered income accruing to the estate and subject to income tax." (Italics ours.) (Published in Corporation Trust Co., Income Tax Service, 1916, at p. 60.)

Thus, in so far as there was any evidence of departmental construction of the 1913 Act, the appraised value at the time of settlement, which can only be taken to mean the time of the order of final distribution, constituted the basis.

Construction Under the 1916 Act, and That Act as Amended by the 1917 Act.

Paragraph 44, Regulations 33 (1918 Edition), contains the following:

> *"The value of property acquired by inheritance.*—The appraised value at the time of death of the decedent is the basis for determining gain or profit upon a sale subsequent to the death after March 1, 1913."

While this regulation makes no specific reference to residuary legatees, it does make specific reference to the date of death. This, however, is not by any means free from doubt and was substantially modified in the next regulations which were promulgated under the 1918 Act. There is no other evidence of departmental construction of these acts.

CONSTRUCTION UNDER THE 1918 ACT.

Article 1562 of Regulations 45 (1919 Edition and 1920 Edition), is as follows:

> *"Sale of property acquired by gift or bequest.*—In the case of property acquired by gift, bequest, devise, or descent the basis for computing gain or loss on a sale is the fair market price or value of the property at the date of acquisition or as of March 1, 1913, if acquired prior thereto. For the purpose of determining the profit or loss from the sale of property acquired by bequest, devise, or descent since February 28, 1913, its value as appraised for the purpose of the federal estate tax, or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes, should be deemed to be its fair market value when acquired. (See section 213(b) (3) of the statute and article 73.)"

It is to be noted that this regulation provides that the basis for computing gain or loss is the market price or value at the date of acquisition. The second sentence does not fix the date of acquisition but merely states a presumption of fact, namely, that the appraised value for estate and inheritance tax purposes should be *deemed* to be its fair market value when acquired. That it was intended to be merely a rebuttable presumption of fact is indicated by a memorandum of the Committee on Appeals and Review, published as A. R. M. 7, in Cumulative Bulletin No. 1, at page 38 (1919). Speaking of the regulation, the Committee said:

> "The Committee is of the opinion that this regulation does not require that the value as appraised shall be final or conclusive, but merely a presumptive value, which may be rebutted by competent evidence."

It was not until 1920 that any ruling of the Department was issued specifically fixing the value at the date of death as the basis for computing the gain or loss upon the sale of property of this character. In that year two rulings were

issued, *Solicitor's Opinion* 1012, published in Cumulative Bulletin No. 2, at page 34; and *Office Decision* No. 667, published in Cumulative Bulletin No. 3, page 52, and both of these rulings held that the basis in the case of a residuary bequest should be the value at the date of death under the 1918 Act.

However, for the first time in the 1921 Act, Congress enlarged the basis provisions of the statutes to include a specific reference to property acquired by bequest, devise or inheritance (Section 202(a) (3), *supra*), and it said:

> "The basis shall be the fair market price or value of such property *at the time of such acquisition.*"

If it was the intention of Congress, by the enactment of this provision, to adopt the departmental construction for the first time announced in 1920, in *Solicitor's Opinion* 1012, and *Office Decision* 667, then why did Congress not use the phrase "at the date of death" instead of "at the time of such acquisition"? If knowledge of departmental rulings may be imputed to Congress then this question was squarely before it at the time it enacted Section 202(a) (3) and its failure to adopt clear and direct language in support of the Government's position is significant. The term that it used, *acquisition*, has a clear meaning. It means "get as one's own", in other words, "become the owner of", and it would certainly seem that Congress intentionally used a term that would fit the varying conditions met when property is acquired by bequest, devise or inheritance, rather than fix any definite date as the time for valuation of all property so acquired.

THE CONSTRUCTION OF THE 1921 AND SUBSEQUENT ACTS.

Regulations 62, 65 and 69 promulgated under the 1921, 1924 and 1926 Acts, respectively, contain provisions substantially identical with *Article* 1566 of *Regulations* 45, *supra*. They contain nothing purporting to interpret Section 202(a) (3) or its equivalent in the subsequent acts as meaning date of death in all cases. *Furthermore, from the enactment of the 1921 Act,*

to the enactment of the 1926 Act, there was no published ruling by the Department purporting to construe Section 202(a)(3) as applicable to any case. On the other hand, there is one significant instance in which the Department contended that the word "acquire" as used in the basis provisions of the 1918 Act means to "get as one's own" or become the complete owner of property. In the *Appeal of City Bank Company, supra,* the Board held that the property was not acquired within the meaning of Section 202 of the 1918 Act until the Court approved the sale, notwithstanding the fact that title related back to the sale. The position of the Solicitor of Internal Revenue before the Board in that case is highly significant. The entire substance of his argument is contained in the following quotation from his brief filed with the Board:

> "The cases cited by the counsel for the taxpayer go no further than to state that upon confirmation of a judicial sale the purchaser's title relates back to the time when he bid the property in. This may be conceded. The fact that a sale is later confirmed can hardly be taken as proof that it necessarily would be confirmed at the time when the successful bid was made. In the present case, subject as the matter was to the approval of the court, it cannot be said that on March 1, 1913, the taxpayer had an unconditional and indefeasible right to the property in question. This unconditional and indefeasible right arose later on March 24, 1913, when the judicial sale made February 28, 1913, was confirmed by the court. Since the property in question was not *acquired* prior to March 1, 1913, its value on that date is immaterial, and the basis for determining gain upon disposition of the property in 1918 and 1920 is the price paid therefor." (Solicitor's Brief, p. 5.)

The foregoing statement of the Department's position in that case presents precisely the petitioner's contention as to what constitutes the acquisition of property in this case.

It is further significant that in 1925 the Board of Tax Appeals decided the *Matthieson* case, and it had become the law of that tribunal to which the vast majority of tax

controversies were being taken, yet when Congress enacted the 1926 Act, February 26, 1926, it did not change the existing basis provisions and did not declare an intention contrary to the Board's decision. The effect of reenactment without change after departmental construction must be at least as great in the case of reenactment without change after judicial or *quasi* judicial construction.

When the Revenue Act of 1928 was under consideration and was enacted in May, 1928, there had been decisions by the Board in the *Matthieson* and the *Foster* cases, by the Court of Claims in the *Matthieson* case, and by the District Court in this case. In that Act, Congress elaborated the basis provisions, but instead of indicating an intention contrary to those decisions it carefully spelled out its intention as in accord with those decisions.

There is no such departmental construction as will support the Government's position in this case, and had the situation been fully presented to the court below, it is not believed the court would have invoked the rule that departmental construction is entitled to great weight.

Moreover, even if there had been consistent and long-continued departmental construction, such construction could not serve to perpetuate an error. The principle is only to be applied in cases where there is real doubt as to the intention of Congress; and to recognize the principle in any other case is tantamount to holding that an erroneous construction by the Department if continued long enough ceases to be erroneous. The rule does not permit the accomplishment of any such thing. *U. S.* v. *Tanner,* 147 U. S. 661, 663; *Morrill* v. *Jones,* 106 U. S. 466; *Bowers* v. *West Virginia Pulp and Paper Company,* 297 Fed. 225 (C. C. A. 2); *U. S.* v. *Fisher,* 2 Cranch 202.

In the *Tanner* case, *supra,* the Court said, "It is only in cases of doubt that the construction given to an act by the Department charged with the duty of enforcing it becomes material". In the *Jones* case, *supra,* the principle was thus expressed, "The Secretary of the Treasury cannot by his reg-

ulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted".

IV.

The decision below is not sound; and its construction of the statute leads to inconsistencies and confusion that do not arise under the proper construction.

In the opinion below, 30 Fed. (2nd) 604, the court stated the question to be whether the petitioner *acquired*, as a residuary legatee, the securities which he sold at the date of his father's death or the date of the order of distribution. The opinion then proceeds, we respectfully insist, to accept as established, legal concepts that are controversial and highly theoretical, to assume that the practical situation demands the construction adopted whereas the contrary is true, and to assume that the departmental construction has been uniform and long continued which is not the fact.

The reasoning in the opinion may be fairly stated as based upon the following propositions:

(1) A residuary legatee under a will acquires at the instant of death that to which he is entitled. Throughout administration he has an equitable title to the assets of the estate and at distribution the specific property to which the equitable title attaches is identified and set apart to him whereupon legal title vests. The decree of distribution relates back to the date of death.

(2) Congress could not have intended that an enhancement in value during the period of administration should escape taxation; and to permit this would enable legatees to escape tax by postponing distribution in a period of rising values.

(3) The Treasury Department has, for a long time, consistently construed the acts as it did in this case.

Under Point I, B, *supra,* is discussed fully the nature of a residuary legatee's interest during the period of administration with citation of many authorities demonstrating the complete lack of control, enjoyment, and power of disposition by the legatee over any asset in the estate. That there is an acquisition by a legatee of a vested right at death has never been denied. On the other hand, petitioner submits that, except in this case below, it has never been decided that the property distributed to a residuary legatee is acquired at death. None of the authorities cited by the court in support of the proposition that a residuary acquires at death that to which he is entitled purport to hold that the property distributed, as distinguished from the mere inchoate and unattached right of the legatee, is acquired at death. On the contrary, *White* v. *Waite, supra,* directly holds that the property distributed is *acquired* at the date of its distribution, and *Alexander* v. *Alexander, supra,* goes even further by holding that real estate is not *acquired* by remaindermen until possession is obtained. Even if the court's view that a residuary legatee acquires an equitable interest in or title to assets of the estate be conceded for the purposes of argument, it merely amounts to saying that one of several residuary legatees has an undivided equitable interest in the estate which can be measured only by a part of an unascertainable residuum which may never exist.

The Court says that when there is a decree of distribution and the legatee for the first time has property set apart to him and gets possession and power of disposition, the decree relates back to the date of death. The doctrine of relation back is only a legal fiction. Primarily it serves the purpose of avoiding a break in the chain of title. For example, in the case of a judicial sale, the buyer does not get legal title and delivery until the sale is approved but his legal title is related back to the date of the sale; and, in the case of an

administrator who of necessity is appointed after death, his title relates back to the date of death. This legal fiction changes no fact, and does not in this case supply, during the period of lapse, any of the indicia of ownership (possession, usufruct, and power of disposition) that were lacking. Indeed, the doctrine is inconsistent in a case such as this with the executor's intervening title and powers. In none of the cases cited by the court on this subject was the doctrine of relation back mentioned in the opinions essential to the decision of the questions before the courts.

As to the belief of the court that it could not have been the intention of Congress to leave untaxed any enhancement of value during the period of administration and to permit residuary legatees to postpone distribution until the market should be favorable, little need be said. When the matter was squarely before Congress at the time of the enactment of the 1928 Act, it specifically adopted the date of distribution. Furthermore, the court below looked at the problem solely from the viewpoint of enhancement in value during the period of administration. It apparently failed to realize that any decline in value would result in a loss to a residuary legatee. Viewed from the standpoint of the total revenues collected any increase in taxable income is offset by the allowance of the losses.

It is asserted that residuary legatees by arbitrarily postponing the distribution until market conditions are advantageous may deprive the Treasury of a tax on the increment to which it is entitled. This argument evidently carried very little weight with Congress for in enacting the 1928 Act the date of distribution was advisedly substituted in place of the time of acquisition in determining the basis. In any event, it is hardly conceivable that in view of the innumerable factors coincident with the settlement of an estate any or all of the residuary legatees would through connivance endeavor to hasten or postpone the date of distribution on account of some possible tax advantage, particularly when any advantage must rest upon forecasting the trend of the stock mar-

ket with respect to the particular securities held for distribution. The hazard of such attempts has been and is being constantly demonstrated.

With regard to the departmental construction, it is submitted that, in view of what has been set out in Point III, the court was under a misapprehension. Unless it is believed, as the Court below seemed to believe, that practical necessity demands the departmental construction and that such construction was long continued by the department, the reasoning of the opinion lacks merit.

Considered as a whole the opinion is not persuasive if an attempt is made to apply it to the question: When did Brewster acquire the stocks which he sold? Nor is it persuasive when an attempt is made to apply it to the language of Section 202(a) (3). The opinion does not recognize the paramount purpose of the statute that the property to be valued is the identical property that was sold; and, in the light of this identity of property sold, it fails to apply the well established meaning of the word *acquisition*. Thus it departs from the problem of statutory construction actually presented, and from the question which the court propounded to itself at the outset. Moreover, the construction adopted by the Court is inconsistent with the revenue acts taken as a whole and gives rise to confusion and dilemmas that would not otherwise exist.

All of the revenue acts contemplate that a taxpayer is to be taxed upon his own income, upon gains and profits realized during the period that he was the owner of property sold. Thus, if a testator in his lifetime sold property at a gain or loss but the proceeds were transmitted at death, such gain or loss is taxable to the testator in a return filed for the last year or fraction of a year of his life. The estate of a decedent during the period of administration is a taxable entity and any gains or other income realized by it must be reported and taxed to the personal representative. (Sec. 219, Revenue Acts of 1918 and 1921.) The statute applies literally and sensibly when construed as the petitioner has

done. If the executor sells specific property, being a taxable person, he reports the gain or deducts the loss upon the basis of value at the date of death, namely, when it came to him from the decedent. If a residuary legatee sells specific property or things that were distributed to him from the residue of the estate he should report gain or deduct the loss upon the basis of the value when he acquired it. If the legatee sells before distribution his right eventually to receive a proper share of the residue, which right vested at death and is in itself property, then he reports a gain or deducts a loss, measured by the difference between the value of that right at death and the proceeds of its sale. This simple and rational application of the statute, both in its fundamental aspects and in the light of its specific language making the basis the value when acquired and exempting from tax the value of the property acquired by bequest, gives rise to no confusion.

There is nothing in the provisions of the statutes here under consideration which indicates that Congress intended to tax or allow to one taxpayer, a residuary legatee, the enhancement or decline in value of property while it was held by another taxpayer, the personal representative. On the contrary, it should be presumed that Congress intended to avoid doing any such thing and thus prevent confusion and dilemma that would otherwise result.

Consider, for example, the dilemma which arises when an executor sells property received from the decedent but buys other property all or a portion of which he eventually distributes to residuary legatees. Suppose an executor received 1000 shares of A stock which he sold and with part of the proceeds paid taxes, debts and expenses, but with the remainder purchased shares of B, C and D stock, which he eventually distributed. Under these circumstances, if the legatee is the real owner as the Court indicates, the gain realized upon the sale of A stock should be the legatee's gain and taxable to him, but the statutes are to the contrary. (Section 219, Revenue Acts, 1918 and 1921.) If value at

date of death must control then it would seem necessary to assign a value to B, C and D stocks as of date of death by apportioning to them some part of the value of the A stock at that date, but this presents both practical and legal obstacles that cannot be surmounted. Therefore, as stated in its brief below, the Department conveniently abandons the construction here urged by it and adopts a different theory, namely, that the cost to the executor becomes cost to the residuary legatee. In doing so, however, it ignores the statutory mandate that the basis shall be the "value of such property when acquired". Thus, at its pleasure, it abandons date of death as being of any significance and substitutes *cost* for *value* to escape from a dilemma due to its construction of the statute, a dilemma which cannot arise under petitioner's more rational construction.

Of necessity, when there are several residuary legatees and several classes of property, each class not susceptible of equal partition or not susceptible of partition at all, the division of property at the time of distribution must be upon the basis of its value when distributed and not its value at death. Otherwise, serious inequality would oftentimes result contrary to a testator's intentions. Suppose a case where legatee A took, for example, stocks worth $100,000 at the date of distribution but which at death were worth only $10,000; and suppose legatee B took bonds worth $100,000 both at date of distribution and date of death. If A had sold the stocks for $100,000 in 1921 the Department would have imposed a tax on $90,000, thus taking from him approximately $25,000 in taxes and, to that extent, deprive him of the value of the property acquired by bequest. But if B sold his bonds in 1921 for $100,000 the Department would take nothing from him in taxes. It is inconceivable that Congress could have intended so to thwart the intentions of a testator and so ignore the settled principles governing estates and their administration when it provided that no income tax should be imposed upon the "value of property acquired by * * * bequest * * *." On the

contrary it is not only sensible but also in keeping with all principles of law here pertinent that Congress should have ment what it apparently said, the value when *acquired* by a legatee should not be subjected to the income tax. It would be equally inconceivable that Congress could have intended to allow a loss in the converse of the above illustration.

CONCLUSION.

It is respectfully submitted that for the reasons set out above the judgment of the Circuit Court of Appeals for the Second Circuit is erroneous and should be reversed.

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No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1928

E. FRANKLIN BREWSTER, PETITIONER

v.

BERT P. GAGE, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

U.S. GOVERNMENT PRINTING OFFICE: 1929

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MEMORANDUM FOR RESPONDENT

The Collector does not oppose the petition.

This case involves the construction of Section 202 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 229, which provides in part as follows:

> That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * *
>
> (3) In the case of such property, acquired by bequest, devise, or inheritance, the basis

> shall be the fair market price or value of such property at the time of such acquisition.
> * * *

The particular question is, when is the time of "acquisition"?

In the present case the United States Circuit Court of Appeals for the Second Circuit, reversing the United States District Court for the Western District of New York and refusing to follow two decisions of the Board of Tax Appeals and a decision of the Court of Claims, has held that the property involved was acquired at the time of the death of the testator rather than on the date of the order of distribution.

Cases presenting similar questions are now pending before the Board of Tax Appeals involving many millions of dollars and there are, in addition, numerous cases under consideration by the Bureau of Internal Revenue which have not yet reached the Board of Tax Appeals, while new cases are constantly arising.

The question is an important one and should be settled by this Court. For that reason the Government concurs in the petition for certiorari.

Respectfully submitted.

/ WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1929.

○

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BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 61

E. FRANKLIN BREWSTER, PETITIONER

v.

BERT P. GAGE, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York (R. 16–18) is reported in 25 F. (2d) 915. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 25–30) is reported in 30 F. (2d) 604.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered February 11, 1929. (R. 30.) Petition for certiorari was filed

April 4, 1929. Certiorari was granted May 13, 1929. (R. 33; 279 U. S. 831.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under Section 202 (a) (2) of the Revenue Act of 1918 and Section 202 (a) (3) of the Revenue Act of 1921, where petitioner, as one of five residuary legatees, received certain securities from his father's estate, which he subsequently sold, is the basis of ascertaining the taxable gain from the sale, the value of the securities at the time of decedent's death, or their value on the date of the surrogate's order of distribution?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1060:

> SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and
>
> (2) In the case of property acquired on or after that date, the cost thereof * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 229:

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from

a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition * * *.

Revenue Act of 1918, 40 Stat. 1065:

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * but

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * *

Section 213 of the Revenue Act of 1921, 42 Stat. 237, is identical with Section 213 of the Revenue Act of 1918.

Regulations 33, Revised (promulgated January 2, 1918, under the Revenue Acts of 1916 and 1917), paragraph 44, p. 11:

> *Value of property acquired by inheritance.*—The appraised value at the time of the death of a testator is the basis for determining gain or profit upon sale subsequent to the death after March 1, 1913.

Regulations 37, relating to the Estate Tax, under the Revenue Act of 1918, Article 15:

> *Rules for the valuation of property.*—
> * * *
>
> (2) *Stocks and bonds.*—The value of stocks and bonds listed upon a stock exchange should be obtained by taking the mean between the highest and the lowest sale price upon the day of death, provided the sales were made in the regular course of business, and not for the special purpose of establishing value. * * *.

Regulations 45 (approved April 17, 1919, under the Revenue Act of 1918), Article 1562:

> *Sale of property acquired by gift or bequest.*—In the case of property acquired by gift, bequest, devise, or descent the basis for computing gain or loss on a sale is the fair market price or value of the property at

the date of acquisition or as of March 1, 1913, if acquired prior thereto. For the purpose of determining the profit or loss from the sale of property acquired by bequest, devise, or descent since February 28, 1913, its value as appraised for the purpose of the federal estate tax, or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes, should be deemed to be its fair market value when acquired. See section 213 (b) (3) of the statute and article 73.

Regulations 62 (approved February 15, 1922, under the Revenue Act of 1921), Article 1563:

Sale of property acquired by gift on or before December 31, 1920, or by bequest, devise, or inheritance.—In computing the gain or loss from the sale or other disposition of property acquired by gift on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. * * * In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired.

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Regulations 65 (approved October 6, 1924, under the Revenue Act of 1924), Article 1594, and Regulations 69 (approved August 28, 1926, under the Revenue Act of 1926), Article 1594, are substantially the same as Regulations 45, Article 1562, and Regulations 62, Article 1563, *supra*.

STATEMENT

Petitioner's father died May 20, 1918 (R. 10), and the petitioner was one of the residuary legatees of his father's will. In the Surrogate's Court, County of Monroe, City of Rochester, New York, there was entered April 19, 1920, a decree or order of final distribution (R. 5–16) whereby the executors of the will of the father were directed to distribute certain securities to the petitioner. (R. 11–12.) Some of these securities were sold by petitioner during the years 1920, 1921, and 1922 (R. 5), and in the table printed below are set forth (1) the years in which the respective sales were made; (2) the number of shares sold (all of the securities sold being common or preferred stocks), and the names of the issuing corporations; (3) the prices realized by the sales; (4) the values of the sold stocks at date of the father's death (as appraised for Federal estate tax purposes); and (5) their values on April 19, 1920, the date of the order of distribution.

TABLE

(1) Year sold	(2) Securities	(3) Sale price	(4) Value at father's death	(5) Value at Apr. 19, 1920
1920	22 shs. Eastman Kodak	$11,550.00	$9,350.00	$12,100.00
1920	25 shs. Lincoln Bank	6,250.00	5,500.00	6,875.00
1920	15 shs. American Chicle, pfd	944.40	945.00	1,080.00
1921	66 shs. Childs Co., com	6,257.46	4,290.00	5,940.00
1922	22 shs. Bankers Trust Co	8,024.72	5,398.58	8,514.00
1922	60 shs. Gen'l Cigar Co. (United Cigar Stores), com	4,631.10	2,700.00	4,140.00
		37,657.68	28,183.58	38,649.00

This table differs from the one found on page 5 of the Record in these respects, viz: It omits the value of the stocks as of June 28, 1920, the date when they were received by petitioner, since those values are not here material under the contentions of the parties. It adds a column giving the value of the stocks on April 19, 1920 (R. 11–12), the date of the decree or order of distribution. See stipulation on page 22 of the Record.

The petitioner duly executed and filed his individual income tax returns for the calendar years 1920, 1921, and 1922, and paid the amount of taxes respectively disclosed thereon. Subsequently, upon an examination and audit of the returns, the Commissioner of Internal Revenue determined that additional income taxes were due from the petitioner for such three years, as follows: $1,799.68 for the year 1920, $94.94 for the year 1921, and $453.59 for the year 1922, or a total of $2,348.21. These several amounts were duly assessed, and paid by petitioner under protest, together with interest

amounting to $53.69. Petitioner then filed with the respondent Collector claims for refund of the taxes and interest so paid, each of which claims the Commissioner of Internal Revenue rejected in its entirety. (R. 4.) Thereafter petitioner sued the Collector in the United States District Court for the Western District of New York to recover the taxes and interest thus paid.

In computing the profit or gain arising from the sale of the stock, the Commissioner of Internal Revenue subtracted from the selling prices the values of such stocks on date of the death of petitioner's father. (R. 5.) Whether or not the Commissioner was correct in using this basis rather than the value at the time of distribution was the issue raised by petitioner in his suit to recover the additional taxes paid. (R. 3.) The District Court (trial by a jury being waived in writing and the case submitted upon stipulated facts (R. 22)) held that the date of the order of distribution, and not that of the father's death, controlled and gave judgment for the petitioner. (R. 16–19.) That judgment was reversed by the Circuit Court of Appeals for the Second Circuit, which held that the date of the father's death governed. (R. 25–30.) The petitioner thereafter applied to this Court for a writ of certiorari, which was granted. (R. 33.)

SUMMARY OF ARGUMENT

The sales made in 1920 are governed solely by the Treasury regulations which specifically provide

that the basic date for determining the gain or loss on the sale of property acquired by bequest is the date of the testator's death. These regulations provide rules of general application to devises of real property and bequests of personalty. Since a residuary legatee acquires a vested interest at the testator's death in all the assets of the estate not otherwise disposed of by will, the regulations correctly brought residuary legatees under the general rule. The regulations find support in reason and authority, are calculated to carry out the congressional purpose, are in harmony with the statute, and hence have the force and effect of law.

In exempting from the beneficiary's income the value of property acquired by bequest, Congress intended to sacrifice only the increase in the value of the property which was unrealized at death. This is shown by the provision of Section 219 of the Revenue Act of 1918 which creates out of the estate a new taxable entity which is accountable for all realized gains accruing since the testator's death. In certain cases that section makes the beneficiary accountable for his portion of the income whether distributed or not. Accordingly, the regulations fixing the value at the time of death as the basis for determining gain or loss gave full effect to the exemption in Section 213.

The sales made in 1921 and 1922 are controlled by the Revenue Act of 1921, in which Congress included as the specific basis for determining the gain or loss upon the sale of property acquired by

bequest, the value of the property at the time of such acquisition. In view of the practice under the earlier Acts, the effect of the 1921 Act was to carry into the law the rule of the Treasury Department that the basic date was that of the testator's death. The contemporaneous construction placed upon the Act by the Treasury regulations and the subsequent legislative history of the provision remove any doubt that this was the purpose of the 1921 Act. The change in the 1928 Act was not designed to have any retroactive effect but was due to a change of congressional purpose.

ARGUMENT

I

THE REVENUE ACT OF 1918 SPECIFIES NO BASIS FOR DETERMINING GAIN OR LOSS ON THE SALE OF BEQUEATHED PROPERTY. THE TREASURY REGULATIONS FIX THE VALUE AT THE DATE OF DEATH AS THE BASIS. THE REGULATIONS HAVE THE FORCE AND EFFECT OF LAW AND ARE DECISIVE.

The question involved in this case is the determination of the proper basic date for computing the gain derived from the sale of certain stock received by petitioner as a bequest. The securities were received by petitioner as one of five residuary legatees under the will of his father who died May 20, 1918. The taxes sought to be recovered were assessed and collected upon the theory that the date of death was the basic date for determining gain upon the sale. Petitioner contends that the value

of the securities on the date of the Surrogate's order of distribution, April 19, 1920, is the proper basis. Since the stock increased in value between those dates it is evident that if the earlier date is the basis, the gain realized by petitioner when the stock was sold was greater than it would be if the later date should be adopted as the basis.

Sales of this stock were made by petitioner in 1920, 1921, and 1922. Accordingly, the 1920 sales are governed by the provisions of the Revenue Act of 1918, while the later sales are governed by the Revenue Act of 1921. The only basis specifically mentioned in the 1918 Act for property acquired after March 1, 1913, is cost. There was no specific provision in the Act of 1918 which fixed the basis for determining gain or loss on the sale of property acquired by bequest, devise, or inheritance. Neither was there any such provision in the earlier Acts. Transactions arising under those Acts are therefore governed by the Treasury regulations. The earliest regulation on the subject is found in Regulations 33 (Revised), governing the collection of the income tax imposed by the Revenue Act of 1916 as amended by the Revenue Act of 1917. Paragraph 44 of these regulations provides as follows:

> *Value of property acquired by inheritance.*—The appraised value at the time of the death of a testator is the basis for determining gain or profit upon sale subsequent to the death after March 1, 1913.

Regulations 45, promulgated under the Revenue Act of 1918, provide as follows:

> ART. 1562. *Sale of property acquired by gift or bequest.*—In the case of property acquired by gift, bequest, devise, or descent the basis for computing gain or loss on a sale is the fair market price or value of the property at the date of acquisition or as of March 1, 1913, if acquired prior thereto. For the purpose of determining the profit or loss from the sale of property acquired by bequest, devise, or descent since February 28, 1913, its value as appraised for the purpose of the federal estate tax, or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes, should be deemed to be its fair market value when acquired. See section 213 (b) (3) of the statute and article 73.

This article does not specify the date of death as the basic date for determining gain or loss on the sale of bequeathed property but provides that the basis shall be the value of such property as appraised for the purpose of the Federal estate tax or, in some cases, State estate taxes. But this is tantamount to fixing the value at the date of death as the basis, because Section 402 of the Revenue Act of 1918 (40 Stat. 1097), dealing with the estate tax, provides:

> That the value of the gross estate of the decedent shall be determined by including the value *at the time of his death* of all prop-

erty, real or personal, tangible or intangible, wherever situated. (Italics ours.)

Regulations 37, Article 15, interpreting Section 402 of the Act, provide that the value of stocks and bonds listed upon a stock exchange should be obtained by taking the mean between the highest and lowest sale price *upon the day of death.* Accordingly, it is clear that the regulations under the 1918 Act, like the regulations under the 1916 and 1917 Acts, require that the computation of gain or loss on the sale of property acquired by bequest, devise, descent, or inheritance, shall be made on the basis of the value of the property at the decedent's death. For a Departmental ruling under facts similar to those of the case at bar see O. D. 667 published in C. B. 3, page 52 (1920).

The sales of stock made in 1920 by the petitioner are governed by these regulations, which we submit are in harmony with the statute and authoritative aids in disposing of the question presented. It is settled that regulations made by a department of government, addressed to and reasonably adapted to the enforcement of an Act of Congress, the determination of which is confided to such department have the force and effect of law, if not in conflict with express statutory provisions. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 349; *Bellefield* v. *Heiner* (C. C. A. 3d), 25 F. (2d) 560.

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Congress has adopted a broad definition of gross income with the purpose of exercising its power to tax income to the fullest extent. See *Irwin* v. *Gavit*, 268 U. S. 161, 166. By Section 219 of the Revenue Act of 1918 there was specifically imposed a tax upon the income received by estates of deceased persons during the period of administration or settlement of the estate. Accordingly, if the estate had sold the stock involved in this case, the income realized by sale would have been taxable thereunder. The estate did not sell the stock, but turned it over to the beneficiary together with the increment of increased value which had not yet been realized. Since it seemed to be the intention of Congress to reach that increment when it was realized by sale of the securities, the Treasury Department, charged with the duty of promulgating regulations reasonably adapted to the enforcement of the Act, ruled that the time of the testator's death should be the basic date for the computation of gain or loss on the sale of property acquired by bequest. Any other rule would have created a hiatus in the continuity of the tax and resulted in a part of the increment of increased value of the property escaping the tax.

This rule fixing the value at the date of the testator's death as the basis for computing gain or loss not only prevents a hiatus with respect to income derived from property received by a beneficiary and subsequently sold, but it likewise gives effect

to losses in value occurring while the estate is under administration. In truth, the stock represented only a single investment of capital—that made by the testator—and when through sale the increase was separated therefrom it became income from that investment in the hands of the recipient subject to taxation according to the very words of the Sixteenth Amendment. When Congress specifically required the recipient of the entire increase in a gift to account for all of the increase over the donor's investment as income, this Court held that the provision of the statute was entirely appropriate for enforcing a general scheme of lawful taxation and that Congress acted neither unreasonably nor arbitrarily in enacting such statute. *Taft* v. *Bowers,* 278 U. S. 470.

So, in this case, we submit that the rule of the Treasury Department, holding the beneficiary accountable for the part of the increase which had accrued since the testator's death, was not only appropriate, but was essential in order to effectuate the evident purpose of Congress to tax all increase in property left by a decedent when the increase was realized by sale.

Not only do the regulations find support in their appropriateness to effectuate the Congressional purpose, but they are supported both by law and by reason when the realities of ownership of bequeathed properties are considered.

The regulations apply with equal force to property of every description, both real and personal.

We assume there is no objection to the rule of the Treasury as it affects real property acquired by devise or descent, since it has long been settled with respect to inheritances of real property that the interest of the heir or devisee is acquired upon the death of the deceased. Petitioner's objection to the rule as applied to personalty rests upon the proposition that title to it passes on death to the executor or administrator, and not to the legatee or distributee, who acquires no right of possession until a distribution is provided for.

In adopting regulations for the enforcement of the Revenue Acts we think that the Treasury Department is not bound by the strict rules relating to the devolution of title. In *Seattle* v. *Kelleher,* 195 U. S. 351, 359, this Court said, "The principles of taxation are not those of contract," and held that such principles could not prevent the taxing authorities from levying a special assessment for a public work already done. Moreover, taxation is a practical matter. This Court has held that Congress may tax as a corporation an association which, although unincorporated, transacts its business as if it were incorporated. *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110. When applying a Federal tax statute the Federal courts are free to determine rules of property independently of the local rule. *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503; *Weiss* v. *Weiner,* 279 U. S. 333, 337. In *United States* v. *Robbins,* 269 U. S. 315, this Court said that, even if it were assumed that a

wife has an interest in community income, it does not follow that Congress cannot tax the husband for the whole. Accordingly, we think that as a practical matter it was appropriate to charge the beneficiaries of personal property with an interest in the bequest from the time of the testator's death. Moreover, the law recognizes such an interest.

While it is true that the executor or administrator holds legal title to the personal property comprising the estate during the period of administration, it is equally true that the legatee who receives assets on distribution has been the real owner thereof from the time the assets came into the estate. If he takes a specific bequest, the property has been identified with him since the death of the testator and it is not subject to sale by the personal representative of the deceased except when all other personalty fails to yield sufficient proceeds to meet demands upon the estate. If the property changes in value during the administration of the estate, it affects the legatee alone. Even if he is a residuary legatee, such as the petitioner, he acquired a vested interest at the testator's death in all the assets of the estate not otherwise disposed of by the will. Schouler on Wills, Executors and Administrators (6th Ed.), Vols. 2, 4, Secs. 1299, 3062, 3148; Roper on Legacies, Vol. 1, p. 552; Jarman on Wills (6th Ed.), Vol. 1, p. 822. Such is the law in New York and generally. See *Matter of Lansing*, 182 N. Y. 238; *Matter of Russell*, 168 N. Y. 169;

Matter of Seaman, 147 N. Y. 69; *Vail* v. *Vail,* 49 Conn. 52; *Cook* v. *McDowell,* 52 N. J. Eq. 351.

It is well settled that the interest of a distributee of a decedent's estate attaches upon the date of the decedent's death. In *Hooper* v. *Bradford,* 178 Mass. 95, the question was whether, for the purposes of the Massachusetts collateral inheritance tax, stock left by the testator was to be valued as of the date of the testator's death or as of some later time. The stock had appreciated in value between the date of death and the date of distribution. In holding that the legacy tax was to be assessed on the value of the property as of the time of the testator's death, it was said (p. 97):

> The time when the property passes under a deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the latter instance the interest of a legatee is subject to an account, but still it is an interest in the fund as it is, analogous to that of a *cestui que trust,* and vests at the death of the testator.

To the same effect is *Mechanics' Savings Bank* v. *Waite,* 150 Mass. 234, and *Kingsbury* v. *Chapin,* 196 Mass. 533. The rule is the same in the case of intestacy. In *Perryman* v. *Greer,* 39 Ala. 133, the court said (p. 136):

> The right of a distributee attaches upon the death of the intestate. The interest then accrues, and the subsequent division serves to ascertain and define, convert into a legal

> right, and reduce to possession, an equity which existed before in the form of a *chose in action,* cognizable in chancery. Therefore, the property which the distributee of an estate receives under the statute of distribution, does not accrue to the distributee by virtue of the division or reduction to possession, but in consequence of a right springing up upon the death of the intestate.

The interests which vest in the legatees are equitable in their nature but they constitute the real and substantial ownership. To be sure, the rights of the legatees as to any specific assets may be divested if in the administration of the estate it becomes necessary that assets be sold to provide funds for payment of claims against the estate, but this possibility does not affect the question here. We are concerned with specific properties turned over to residuary legatees at distribution, and as to such there has been no divestiture. Even the title of a devisee to real property, which vests on the death of the testator, may be divested and the property sold to pay debts, if the personal property is insufficient. *Covell* v. *Weston,* 20 Johns. 414, 419. See Schouler on Wills, Executors and Administrators, 6th ed., Vol. 3, Sec. 1986; 23 Corpus Juris 1136.

It is conceded (Br. 18) that it is quite proper to treat the value of real estate and specific bequests at date of death as the appropriate basis for determining gain derived upon a sale, but it is contended

that the application of the same basis to a residuary legatee is altogether repugnant to any concept of income because a residuary legatee has no right to or any interest in any specific item of property during the period of administration. But this contention overlooks the rule that the title at distribution relates back to the inception of the right, namely, the date of the testator's death. *Foster* v. *Fifield,* 20 Pick. (Mass.) 67, 70; *Thompson* v. *Thomas,* 30 Miss. 152, 158. In *Thompson* v. *Thomas, supra,* the court said:

> Distribution gives to the distributee no new title to the property, but only ascertains the property to which his title shall attach * * *.

In *People ex rel. Crook* v. *Wells,* 179 N. Y. 257, the testator gave his residuary estate, consisting of personal property, to a charitable corporation the property of which was exempt from taxation. The single issue in the case was whether the residuary estate, being still in the hands of the executor, was exempt from taxation. The court said (p. 259):

> That the corporation, at the time of the assessment, was the absolute owner of the $85,000 in personal property assessed is, I think, too clear for controversy. The residuary estate vested in the corporation at the moment of the death of the testator and at no time since his death was the property bequeathed to the charitable corporation subject to taxation.

Since the title of even a residuary legatee relates back to the death of the testator, we submit that the Treasury regulations properly and appropriately made a rule of general application to all bequests. As said by the court below (R. 27):

> To ignore the gain upon so much of the sold title as was equitable would be a subordination of that which is real and substantial to that which is neither.

It is the general policy of the law to follow income into the hands of the recipient and tax it there, and there can be no doubt since *Taft* v. *Bowers, supra,* that the taxation to the recipient of the realized increase from property, even though a portion of the increase occurred before his ownership attached, is not only within the competency of Congress, but that it is neither unreasonable nor arbitrary. The regulations have not attempted to do here all that the Act of Congress involved in the *Taft case* accomplished. The statute involved there was Section 202 (a) (2) of the Revenue Act of 1921, in which Congress provided that the basis for determining gain or loss on the sale of property acquired by gift should be the cost to the donor. In the instant case the regulations have reached only the increase accruing since the death of the testator and have not reached back to the date of original purchase. Congress evinced a purpose in the provisions for taxation of the income of estates to create out of the estate a new taxable entity and

these regulations have gone no further than to hold the beneficiary accountable for the same increase which the personal representative would have had to account for if he had sold the property during the administration of the estate.

Nor does the fact that Section 213 (b) (3) of the 1918 Act excludes from gross income the value of property acquired by gift, bequest, devise or descent, affect the conclusion that the proper basis for determining gain or loss is the value at the date of death. This section of the statute grants an exemption from tax which should be strictly construed to mean that the date of acquisition was the date of death. This exemption renders tax free any and all appreciation in the value of the property which occurs before acquisition. At the same time Congress specifically required the estate to account for all realized increases over the value of the property at the time of the death. (Section 219, Revenue Act of 1918; Regulation 45, Article 343.) These sections are in *pari materia* and we submit that it would not be reasonable to impute to Congress an intention that the increase occurring in the value of property during the period of administration should be exempt from taxation if it were realized by sale by the beneficiary after distribution, although it would be taxed if realized by a sale made by the executors. Section 219 (d) provides with respect to income of the estate which is to be distributed to the beneficiaries periodically, that the bene-

ficiaries, rather than the estate, shall account for the income, whether actually distributed or not, clearly showing that the exemption to the beneficiaries does not include realized increases in value during administration. In fact it is no broader than the sacrifice of the increase in the value of property which was unrealized at death. The creation of a new taxable entity out of the decedent's estate had this effect and we think it is clear that Congress intended to tax to some one all increases occurring thereafter.

Petitioner contends (Br., p. 18) that Section 213 (b) (3) is not in fact an exemption because, irrespective of the statute, the value of the bequests and devises is not income and has never been so considered. This must be deemed an open question. The exemption in Section 4 of the Revenue Act of 1916, c. 463, 39 Stat. 756, 758, referred to bequests and devises as "income." See *Rice* v. *Eisner* (C. C. A. 2d), 16 F. (2d) 358, 360. The language is:

> SEC. 4. The following income shall be exempt from the provisions of this title:
> * * * the value of property acquired by gift, bequest, devise, or descent * * *.

The amendment of this section by Section 1200 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 329, made no change in this language. The Acts of 1918 and 1921 are phrased as providing an exemption. It is an elementary rule that tax exemptions are to be strictly construed. (*Bank of Commerce* v. *Tennessee*, 161 U. S. 134.)

But whether or not the entire bequest could be considered "income" and the language of the Act thus deemed to create a true "exemption," there would seem to be no doubt, under the *Taft case,* of the power of Congress to tax as income, when realized, the entire increase in the value of the bequest from the time of its acquisition by the decedent. The language of the Act is therefore at least a relinquishment of the right to tax part of what could constitutionally have been taxed, that is, the realized appreciation in value of the property from the date of its acquisition by the deceased until the date of his death.

In the absence of some clear indication of Congressional intent to the contrary, that construction should be avoided here which would have the practical effect of extending this relinquishment by rendering free from tax such further appreciation in value as may take place after the death of decedent, when realization is made thereon by sale or other disposition of the property. That the construction urged by the petitioner would have this effect in many cases can not be questioned.

If the construction of the Act advocated by the petitioner had been adopted by the Treasury Department, it would have opened the door to tax avoidance. By reason of the fact that the personal representatives and the beneficiaries are frequently the same persons, or have close family connections, the temptation and opportunity would have been

presented to avoid or minimize tax liability. Such could easily have been accomplished by postponement of distribution during a period of enhancement of values.

We therefore submit that the Treasury regulations under the Revenue Act of 1918, which alone govern the sales of stock made by petitioner in 1920, find support in reason and authority, are calculated to carry out the Congressional purpose, are in entire harmony with the statute, and hence have the force and effect of law.

II

THE REVENUE ACT OF 1921 ENACTED INTO LAW THE PRACTICE OF THE TREASURY UNDER THE PRIOR ACTS SO THAT THE VALUE OF BEQUEATHED PROPERTY AT THE TIME OF THE TESTATOR'S DEATH IS ALSO THE CORRECT BASIS FOR DETERMINING GAIN OR LOSS UNDER THIS ACT

The sales made by petitioner in 1921 and 1922 are controlled by the Revenue Act of 1921. Whereas the only basis specifically mentioned in the prior Acts for determining gain or loss upon the sale of property acquired subsequent to March 1, 1913, was cost, the Revenue Act of 1921 introduced a new provision for determining the gain derived or the loss sustained from the sale of property acquired by bequest. In Section 202 (a) (3) the statute provided:

> In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition * * *.

Accordingly, with respect to the sales made by petitioner in 1921 and 1922, the more specific question is whether the property was "acquired," within the meaning of this statute, on May 20, 1918, the date of the testator's death, or on April 19, 1920, the date of the order of final distribution.

Congress is presumed to have legislated with knowledge of the existing administrative rule. *United States* v. *Bailey,* 9 Pet. 238, 256. In view of the practice of the Treasury Department under the prior Acts we think the rule that the basis was the value of the property at the time of the testator's death was enacted into law with the passage of the Revenue Act of 1921. At that time it seems to have been accepted that the date of the testator's death was the date of acquisition and that the exemption to which beneficiaries were entitled was limited to the value at that time. The earliest case dealing with this subject was decided by the Board of Tax Appeals on October 20, 1925. *Appeal of Matthiessen, Jr.,* 2 B. T. A. 921. Accordingly, it appears that the departmental construction was unchallenged at the time of the passage of the 1921 Act. Certainly no apt language was used to indicate that Congress desired the rule to be different from the established practice under the prior Acts. On the contrary, Congress, by employing the phrase "time of such acquisition," carried into this section the same meaning which the word "acquired" had come to have in connection with Section 213 (b) (3) of the 1918 Act.

By reason of considerations drawn from the substantive law it has been shown that for practical purposes property acquired by bequest, devise, or descent vests in the beneficiary immediately upon the death of the decedent and that the value of the property at that time was adopted by the Treasury under the prior Acts as the basis for measuring gain or loss upon sale. This being true, we think that the language "time of such acquisition" was used in the 1921 Act as having reference to the same time, that is, the date of the testator's death. We think that Congress recognized the logic and fairness of the earlier regulations and wrote them into the law.

This conclusion is fortified by the fact that courts have also, in discussing personal property passing by reason of a death, spoken of such property as "acquired" at the death of the testate or intestate. Such use of the word appears in the case of *United States* v. *Bolster* (C. C. A., 1st), 26 F. (2d) 760. There the testator provided in his will that the residue of his estate should be held in trust and the income paid to his widow during her lifetime, such provision being made in lieu of her dower and all other claims upon the estate. The provision was accepted by the widow and the question concerned the Government's right to tax the income which she received from the trustee. It was stated by the court (p. 762) that the widow—

> had no interest in the corpus of the estate until the death of her husband * * *.

> At that date she was entitled to receive her statutory share in the corpus of the estate, and "acquired" her property rights in it.

In the same paragraph the court speaks of the fair market value of the property at the time of its "acquisition" and the context of the opinion clearly indicates that the word "acquisition" is intended to relate to the death of the testator.

In *Vail* v. *Vail*, 49 Conn. 52, the testator, who died in 1866, bequeathed a fund to trustees to pay to his children, among whom was a married daughter, the rents, dividends, and income annually. The question was whether payments made to the daughter after the enactment of the Married Women's Act of 1878, which provided that "all property hereafter acquired by any married woman shall be held by her to her sole and separate use," were her separate property. The court said (p. 56):

> It is insisted that the property in question consists only of certain dividends and income which are not *acquired* till actually paid, or at least until they have become payable. (Italics in original.)
>
> * * * * *
>
> But the property bequeathed to Mrs. Vail * * * was "*acquired*" once for all when the will became operative by the decease of the testator. (Italics ours.)

Also in *Matter of Lansing*, 182 N. Y. 238, where a question as to the imposition of an inheritance tax enacted subsequent to the death of the testator was

considered in connection with a remainder following a life estate, the court said (p. 248):

> [The remainder] was *acquired* by Mrs. McVickar under her grandfather's will at the instant of his death. (Italics ours.)

Petitioner cites in his brief (p. 13) two cases in which the court had made use of the word "acquired" seemingly opposed to its employment in the authorities immediately preceding. In the case of *White and Wife* v. *Waite*, 47 Vt. 502, it should be noted that the statute therein considered provided that—

> all personal property and rights of personal action *acquired* by any married woman during coverture, by inheritance *or distribution*, shall be held to her sole and separate use. (Italics ours.) Laws of Vermont, 1867, No. 21.)

In view of the enabling nature of the legislation, the court's liberal construction may perhaps have been justified. As to the case of *Alexander* v. *Alexander*, 85 Va. 353, cited by the petitioner, it appears (p. 367) that the court was also inclined to a liberal construction for the same reason. If, as the petitioner states, the decision applied to the inheritance of real property, this emphasizes the fact that it was the nature of the particular legislation that was determinative, for such interest has long been regarded in the law as "acquired" on the death of the decedent. 2 Bl. Comm. (Lewis Ed.) 201.

In *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, this Court held that premiums paid to the taxpayer's agent must be accounted for by the taxpayer as gross income "received within the year from all sources" despite the contention that the money could not be attached as the taxpayer's property and that while in the possession of the agent the money was not subject to beneficial use by the taxpayer. If property can be "received" for purposes of taxation, even though all the elements of ownership are not present, it would seem to follow that property may also be "acquired" within the meaning of the Revenue Acts notwithstanding the fact that the taxpayer has not come into actual possession.

But any obscurity which might otherwise envelop the meaning of the word acquisition should, we submit, be regarded as dispelled by the contemporaneous construction placed upon the statute by the Treasury regulations and by the subsequent legislative history of the provision. In one of the very first cases on the weight to be given departmental construction, *Edwards* v. *Darby,* 12 Wheat. 207, 210, this Court said that in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and carry its provisions into effect was entitled to very great respect. After the lapse of sixty years the court in *United States* v. *Union Pac. Ry. Co.,* 37 Fed. 551, affirmed, 148 U. S.

562, tracing the growth of this principle in our law, observed that (37 Fed., p. 556)—

> "From the time Justice Trimble announced it so cautiously in 1827 [in *Edwards* v. *Darby, supra*] it has gained strength every time it was again considered by the court. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before."

To the same effect are *United States* v. *Boston & M. R. Co.*, 279 U. S. 732; *United States* v. *Johnston*, 124 U. S. 236, 253; *Brown* v. *United States*, 113 U. S. 568; *Burditt & Williams Co.* v. *United States* (C. C. A. 1st), 153 Fed. 67, 72.

The great force of the rule was said in *United States* v. *Moore*, 95 U. S. 760, 763, to lie in the fact that—

> The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

A fortiori is this true of an internal revenue law such as is here under consideration.

In this particular instance even greater strength is lent to the rule just discussed by reason of the subsequent reenactment in later Acts of the same provision of law after its meaning had been fixed by departmental construction.

Regulations 62, Article 1563, promulgated under the Revenue Act of 1921, construed Section 202 (a) (3) as continuing the Treasury rule which ex-

isted under the prior Acts. In Section 204 (a) (5) of the Revenue Act of 1924, c. 234, 43 Stat. 253, and Section 204 (a) (5) of the Revenue Act of 1926, c. 27, 44 Stat. 9, Congress made no material change in the basis for measuring gain or loss upon the sale of property which was the subject of a bequest. The Treasury regulations under those Acts likewise put a consistent construction upon them. Regulations 65, Article 1594; Regulations 69, Article 1594.

The rule has been settled by numerous decisions of this Court that when Congress reenacts a statute which has received departmental construction it is considered to have given implied legislative recognition and approval to such interpretation, as it is presumed to have legislated with a knowledge of the usage of the executive department of the Government. In other words, departmental interpretation in such case becomes a legislative interpretation and has the force and effect of law. *United States* v. *G. Falk & Brother,* 204 U. S. 143; *United States* v. *Hermanos y Compania,* 209 U. S. 337; *National Lead Co.* v. *United States,* 252 U. S. 140.

Congress twice reenacted the provision in question after the interpretation herein contended for had been given it by the Treasury Department. It is true that before the second of these reenactments, in the Act of 1926, the Board of Tax Appeals had in 1925 laid down a contrary rule in the

Matthiessen case, supra. That and the following similar decisions of the Board were not acquiesced in by the Commissioner of Internal Revenue, and it is submitted that, so far as concerns the construction of the Act of 1921 here involved, which was passed some years before they were decided, they do not affect the rule as to the incorporation of departmental construction into a reenactment of the statute construed.

Nor does it militate against the force and effect of this rule that the Revenue Act of 1928, c. 852, 45 Stat. 791, introduced a change with respect to the basis for measuring gain or loss in the case of property acquired by bequest or devise. In Section 113 (a) (5) thereof (p. 819), it, in short, prescribes that, in the case of personal property acquired by specific bequest, and in the case of realty devised or passing by intestacy, and in the case of any property owned by the decedent and thereafter sold by the personal representative, the basis of ascertaining gain or loss should be the fair market value of the property at the time of the decedent's death. In all other cases of property acquired either by will or by intestacy, the basis should be the fair market value at the time of distribution to the taxpayer.

This new legislation was designed, primarily, to meet the confusion brought about by the decision of the Court of Claims in the case of *May McKinney* v. *United States,* 62 C. Cls. 180, where it was

held that there was no taxable gain where the executors sold, for more than its value at the time of the decedent's death certain corporate stock, which the decedent had purchased, it being shown that the cost price, and the market value of the stock on March 1, 1913, exceeded the amount for which the executors made the sale. The soundness of this decision was questioned both within and without the Department, and for decisions to the contrary see *Appeal of Straight, Executrix,* 7 B. T. A. 177; *Miller, Executrix,* v. *Commissioner,* 11 B. T. A. 854; *Bankers' Trust Co.* v. *Bowers,* 23 F. (2d) 941; *Eldredge* v. *United States,* 31 F. (2d) 924, 930.

Congress was not satisfied to leave the matter in doubt and the committee reports which are set forth in the appendix show that the *McKinney decision* was the occasion for the new legislation. Adopting the proposal of the Finance Committee, Congress, in the Revenue Act of 1928, wrote into the new statute a provision fixing the date of death of the decedent as the basic date where property of the estate was sold by the personal representative. This had always been the interpretation of the Department prior to the decision in the *McKinney case.*

Going further, Congress then proceeded to change the rule theretofore recognized, to the extent of making the basic date the date of distribution where the property did not pass by a specific bequest thereof or was not realty.

Hence it appears that the change in the 1928 Act was not designed to correct any misinterpretation which the Treasury had placed upon the earlier Acts. On the contrary, it was designed to correct another situation and the change with respect to the matter involved in the instant case was incidental to the major purpose of Congress. The fact that the language of an Act has been amended by a subsequent Act indicates an intention to adopt a new rule for the future. *Irwin* v. *Gavit* (C. C. A., 2d), 295 Fed. 84, 88. Under these circumstances there is no room for the contention here that the 1928 Act was a legislative direction to the courts in expounding the provisions of the prior Acts. In the 1928 Act Congress showed a clear change of purpose which should not be given retroactive effect, in view of the strong presumption against retroactivity. *Russell* v. *United States,* 278 U. S. 181. The Board of Tax Appeals has specifically held that the section is not retroactive. *Nellie B. McGee* v. *Commissioner,* 13 B. T. A. 1181, 1184.

Overturning long-continued administrative construction of the Revenue Acts is especially to be deplored. It results in administrative confusion and in discrimination between taxpayers whose cases have been finally closed and those whose cases are still open.

Neither is there any room here for the application of the principle that taxing statutes must be construed most strongly in favor of the taxpayer.

No rule for measure of gain or loss could be framed which would not prove disadvantageous to one class of taxpayers and at the same time advantageous to another class. While it would be to the advantage of petitioner in the instant case to have the date of distribution adopted as the basic date, that basis would work to the disadvantage of many others, depending upon whether the market rose or fell during the period of administration. Therefore, it is evident that the taxpayers are not all on one side of this question and the general principle can have no application here.

The petitioner's argument in this case is in substance a restatement of the *ratio decidendi* in the case of *Appeal of Matthiessen, Jr.*, 2 B. T. A. 921, which, as previously stated (p. 26), was the first case wherein any taxpayer ever sought to litigate the matter of the Department's construction. The Board of Tax Appeals in that case held that the taxpayer, who was the residuary legatee of his father's estate, acquired certain stock at the date of an agreed distribution rather than at the time of decedent's death, and rested its decision primarily upon the premise that the right of the executor or administrator to possession during the period of administration left the legatee with no property right as to any specific assets of the estate. The answer to the petitioner's contention is that the statute is concerned with property which has been received by the legatee and as to such his title relates back to the death of the testator and has never

been divested. See *Christie* v. *C., R. I. & P. Ry. Co.,* 104 Iowa 707. He has remained the real owner throughout all the period during which the property has increased in value.

Petitioner quotes (Br. p. 10) from the case of *United States* v. *Jones,* 236 U. S. 106, which authority was also greatly relied upon by the Board in the *Matthiessen case.* The quotation used by petitioner, however, must be considered in connection with the question involved. This Court was there concerned with a statute prescribing that no succession tax should be assessed or imposed—

> in respect of any contingent beneficial interest which shall not become *absolutely vested in possession or enjoyment* prior to said July first, nineteen hundred and two. (Italics ours.)

Since, in virtue of the statute, no account was to be taken of the vesting in interest, but only of the vesting in enjoyment, it is manifest that the extract from the opinion is of no force here.

In *F. W. Matthiessen* v. *United States,* 65 C. Cls. 484, the decision of the Board of Tax Appeals in the case of the same name was followed and approved. The reasoning of the Court of Claims and the Board of Tax Appeals is not convincing. It proceeds on the theory that Revenue Acts are to be applied in strict accord with the rules relating to the devolution of title and fails to give effect to the apparent adoption by Congress in the 1921 Act of the established meaning given to the word "acquired"

by the practice of the Treasury under the earlier Acts.

In *Alice Fisher Foster* v. *Commissioner*, 7 B. T. A. 1137, *Charles E. Moser* v. *Commissioner*, 12 B. T. A. 672, and *Nellie B. McGee* v. *Commissioner*, 13 B. T. A. 1181, the Board followed its prior decision in the *Matthiessen case*. The *McGee case* involved a California statute under which title to personal as well as real property vested in the heir or the beneficiaries under the will, subject to the lien of the executor and administrator for the payments of debts and to his right of possession. Notwithstanding this, the Board adhered to its earlier decision, showing the extreme importance it attaches to an absolute vesting in possession and its disregard of the practical effect of the interest acquired at the testator's death.

In *Appeal of City Bank Co.*, 1 B. T. A. 210, the Board of Tax Appeals held that a taxpayer who was the successful bidder upon property at a master's sale on February 28, 1913, did not acquire the property prior to March 1, 1913, because the sale was confirmed thereafter on March 24, 1913, and it was only on the latter date that he had obtained it as his own. That case turned on its own facts and there is no necessary analogy between the interest acquired by a successful bidder at a judicial sale and the interest acquired by a beneficiary under a will.

Petitioner refers (Br., pp. 34–35) to a supposed dilemma arising when the executor sells property

received from the decedent but buys other property which eventually is distributed to residuary legatees. The rule of the Treasury Department with respect to the basis for determining gain or loss upon sale of such property by the residuary legatees is that it is the cost of the securities to the executor. (See I. T. 1165, C. B. I–1, 30.) It is submitted that petitioner's criticism of this ruling as involving an abandonment of the position here taken as to the time of acquisition is not well founded but that rather the ruling is entirely consistent with the purpose of the statute as a whole to tax all gains and make allowances for all losses. Section 219 specifically requires the executor to pay a tax on any gain resulting from sales made by him. There is no indication that the statute intended to require both the executor and the legatee to pay a tax upon the same gain. The effect of the departmental practice is to treat the residuary legatee's equitable title to securities in which the executor reinvests as acquired at the time of the reinvestment, so that the basis for determining gain or loss upon a subsequent sale thereof by the residuary legatee is the cost to the executor. Under this construction all realized gains from the death of the decedent are taxed either to the executor or to the legatee, but there is no double taxation.

As to petitioner's illustration (Br., p. 35) of possible inequalities resulting from the department's rule, it may be said that such inequalities may result in unusual cases from the application

of any general rule. Such occasional hardships are beyond judicial cognizance. *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1. The inequalities suggested may in the usual case be avoided by a distribution by the executor of each class of securities equally among the residuary legatees.

At any rate, this Court is now dealing only with the case in hand, and difficulties that might arise in imagined circumstances do not require present consideration. *Old Colony Trust Co.* v. *Comm'r of Internal Revenue*, 279 U. S. 716; *United States* v. *Sullivan*, 274 U. S. 259, 264; *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219.

CONCLUSION

In view of the foregoing it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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DECEMBER, 1929.

APPENDIX

The Committee on Ways and Means, in House Report No. 2, 70th Congress, First Session, page 18, deals with Section 113 (a) (5) of the Revenue Bill of 1928, as follows:

> In view of the decision of the Court of Claims in *McKinney* v. *United States*, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113 (a) (5).
>
> It is also provided, in the same paragraph, that the basis in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.
>
> Under existing law, the basis in such a case is the value at the date of "acquisition," which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determinable basis.

The Senate Committee on Finance stated with respect to the proposed change (Senate Report No. 960, 70th Cong., 1st Sess., p. 26):

> The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or

loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other

cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 61.—October Term, 1929.

E. Franklin Brewster, Petitioner, *vs.* Bert P. Gage, Collector of Internal Revenue. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner's father died testate May 20, 1918. The surrogate's court at Rochester, New York, entered a final decree April 19, 1920, pursuant to which certain stocks were distributed to the petitioner as one of the residuary legatees. He sold some of them in 1920, 1921 and 1922. For his income tax returns, he computed profit or loss on each sale by comparing the selling price of the stock with its value at the date of the decree of distribution and paid the amounts so determined. But the Commissioner of Internal Revenue held that the values of the stock at the date of testator's death should be taken for the calculation of income, and on that basis assessed for each year an additional tax which petitioner paid under protest. He brought this action in the district court for the western district of New York to recover the amounts so exacted. That court gave judgment for him. 25 F. (2d) 915. The Circuit Court of Appeals reversed. 30 F. (2d) 604.

The taxes for 1920 are governed by the Revenue Act of 1918, 40 Stat. 1057, 1060, 1065, and those for 1921 and 1922 by the Act of 1921, 42 Stat. 227, 229, 237. As defined in these laws, gross income includes gains derived from sales of property but does not include the value of property acquired by bequest, devise or descent. § 213. Section 202(a) in each Act provides that for the purpose of ascertaining the gain derived or loss sustained from the sale of property "acquired" on or after March 1, 1913, the basis shall be its cost. This provision is made more definite in the Act of 1921 by subdivision (3). It provides that, in case of "property, acquired

by bequest, devise, or inheritance, the basis shall be the fair mar ket price or value of such property at the time of such acquisi tion." It is not suggested by either party that this provisio changed the law or that the basis for computing the tax for 192 under the earlier Act is not the same as that applicable for 192 and 1922 under the later Act. It is necessary to construe th word "acquired" and the phrase "at the time of such acquisition' to determine whether the value of the stock at the time of testator' death or its value on the date of the decree should be used in th calculation.

Upon the death of the owner, title to his real estate passes t his heirs or devisees. A different rule applies to personal prop erty. Title to it does not vest at once in heirs or legatees. *Unite States* v. *Jones*, 236 U. S. 106, 112. But immediately upon th death of the owner there vests in each of them the right to hi distributive share of so much as shall remain after proper ad ministration and the right to have it delivered upon entry of th decree of distribution. *Sanders* v. *Soutter*, 136 N. Y. 97. *Vail* v *Vail*, 49 Conn. 52. *Cook* v. *McDowell*, 52 N. J. E. 351. Upo acceptance of the trust there vests in the administrators or ex ecutors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in th right of others for the proper administration of the estate and fo distribution of the residue. The decree of distribution confer no new right; it merely identifies the property remaining, evi dences right of possession in the heirs or legatees and requires th administrators or executors to deliver it to them. The legal titl so given relates back to the date of the death. *Foster* v. *Fifield* 20 Pick. 67, 70. *Wager* v. *Wager*, 89 N. Y. 161, 166. *Thompso* v. *Thomas*, 30 Miss. 152, 158.

Petitioner's right later to have his share of the residue veste immediately upon testator's death. At that time petitioner becam enriched by its worth which was directly related to and would in crease or decline correspondingly with the value of the property. And, notwithstanding the postponement of transfer of the lega title to him, Congress unquestionably had power and reasonably might fix value at the time title passed from the decedent as th basis for determining gain or loss upon sale of the right or of th property before or after the decree of distribution. And we thin

that in substance it would not be inconsistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death.

Undoubtedly the basis for the ascertainment of gain or loss on the sale of real estate by an heir or devisee is its value at the time of decedent's death. That is "the time of such acquisition". The decree of distribution necessarily is later than, and has no definite relation to, the time when the real estate passes. And generally specific bequests are handed over to the legatees soon after the death of the testator and such property may be and often is sold by them prior to the entry of the decree for final distribution. In such cases gains or losses are to be calculated under these Acts on value at the time of death. No other basis is or reasonably could be suggested.

There is nothing in either of the Acts or in their legislative history to indicate a purpose to establish two bases—(1) value of real estate and specific bequests at time of death and (2) value of other property at date of decree. The rule that ambiguities in tax laws are to be resolved in favor of taxpayers has no application here because it is impossible to determine which basis would impose a greater burden. And neither construction is to be preferred on the ground that the other would raise serious question as to constitutional validity. The generality of the words used in both Acts indicates intention that the value at the time of death of the decedent was to be taken as the basis in all cases.

The Revenue Act of 1918 and subsequent Acts taxed incomes of estates during the period of the administration including profits on sales of property, and such gains are calculated on value at date of decedent's death.* There appears to be no reason why gains or losses to the estate should be calculated on one basis and those to the residuary legatees on another.

Treasury Regulations under the Revenue Acts in force between 1917 and 1928 declared that value at time of the death of decedent should be taken as the basis for ascertaining profit or loss from

*§ 219, Revenue Act of 1918, 40 Stat. 1071; Regulations 45, Art. 343. § 219, Revenue Act of 1921, 42 Stat. 246; Regulations 62, Art. 343. § 219, Revenue Act of 1924, 43 Stat. 275; Regulations 65, Art. 343. § 219, Revenue Act of 1926, 44 Stat. 32; Regulations 69, Art. 343.

sale of property acquired by bequest or descent since February 28, 1913. Regulations 33, Revised, paragraph 44, promulgated with reference to § 2(a), Revenue Act of 1916, provided that in computing profit or gain upon property acquired by inheritance, the basis should be appraised value at the time of decedent's death. Regulations 45, Art. 1562, promulgated with reference to § 202 of the Revenue Act of 1918 declared that "for the purpose of determining the profit or loss from the sale of property acquired by bequest, devise or descent since February 28, 1913, its value as appraised for the purpose of the federal estate tax . . . should be deemed to be its fair market value when acquired". And value at the time of death is the basis of that appraisal. § 402. 40 Stat. 1097. Regulations 62, Art. 1563, under the Act of 1921 are substantially to the same effect as the earlier regulations.

These regulations were prepared by the department charged with the duty of enforcing the Acts. The rule so established is reasonable and does no violence to the letter or spirit of the provisions construed. A reversal of that construction would be likely to produce inconvenience and result in inequality. It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. *Logan* v. *Davis,* 233 U. S. 613, 627. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 349. *Swendig* v. *Washington Co.,* 265 U. S. 322, 331.

The meaning of "acquired" in § 202(a) of the Act of 1918 was not changed by and in context means the same as does the phrase "time of such acquisition" in the corresponding provision of the Act of 1921. And that phrase was continued in § 204(a)(5) of the Revenue Acts of 1924 and 1926. 43 Stat. 258. 44 Stat. 14. The regulations promulgated under that section are substantially the same as the earlier regulations. Regulations 65, Art. 1594. Regulations 69, Art. 1594. The substantial re-enactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation. *National Lead Co.* v. *United States,* 252 U. S. 140, 146. *United States* v. *Hermanos y Compania,* 209 U. S. 337, 339. *United States* v. *G. Falk & Brother,* 204 U. S. 143, 152. The subsequent legislation confirmed and carried forward the policy evidenced by

the earlier enactments as interpreted in the regulations promulgated under them.

The Revenue Act of 1928, § 113(a) (5), expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819. The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears. *United States* v. *Magnolia Co.*, 276 U. S. 160, 162, and cases cited. There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes.

Judgment affirmed.

A new copy.

Test:

Clerk, Supreme Court, U. S.